

ANTI-TRUST LEGISLATION : THE LEGAL REGULATION OF MONOPOLY.

Kelvin Jones

Ph.D. Thesis

University of Edinburgh

1981.

(i)



Declaration.

I, the undersigned, declare that this thesis has been composed by myself and that the work is my own. An earlier draft of part of Chapter one was published in Contemporary Crises, 3, (1979) under the title 'Crimes of the powerful and Beyond: An essay Review' and is included as an appendix.

Kelvin J.B. Jones



# ABSTRACT OF THESIS (Regulation 6.9)

Kelvin J.B. Jones

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..... Ph.D. .... Date ..... 1981 .....

f Thesis ..... Anti-trust legislation : The legal regulation of monopoly. ....

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This thesis concerns the legal regulation of economic affairs, paying particular regard to the example of anti-trust legislation as it developed from the last decade of the 19th century into the first half of the 20th century. As such it involves the examination of the concept of legal regulation and the associated idea of the interrelation of 'legal' and 'economic' domains.

It is argued that the issue of monopoly, and the problem of the 'trusts', concerns the growth of the corporate form of ownership. Accordingly, the way in which law perceives the corporate form of ownership is a vital constituent of any sort of viable regulation. Since the perception of the corporate form of ownership is irretrievably bound up with the concept of private property, and since this concept is an inadequate expression of corporate relations of ownership, this fact alone places certain limits upon the reliability of law as a form of regulation. Finally, the thesis sets out the particular way in which anti-trust legislation portrays the corporation in terms of a series of basically human attributes and why this produces problems for regulation. The thesis is concluded by an examination of the real political basis of the anti-trust movement.

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People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary.

Adam Smith, 'The Wealth of Nations'  
(1884) London: T. Nelson & Sons, Book IX p54.



## INTRODUCTION

There are too many texts on anti-trust legislation. Ever since Senator Sherman first articulated proposals for controlling the trusts the topic has attracted a seemingly endless amount of attention. So why add yet another to the near infinite catalogue of texts which ostensibly look at anti-trust legislation? The answer is that this thesis does not add to the cumulative assessment of anti-trust legislation. Its objective is quite different. In one sense it is not even about anti-trust legislation. Rather the purpose in mind is to unveil the principle of legal regulation together with the mechanisms which are conventionally used toward that end. Anti-trust legislation facilitates this process by providing what is perhaps a unique display of a specific legislative attempt to control monopoly. Therefore, anti-trust legislation is of interest only insofar as it examples the more general issue of the feasibility of 'legal' regulation. But how does this differ from other accounts of anti-trust legislation?

Anti-trust legislation is normally regarded from two, essentially conflicting, standpoints. First of all, it is examined as a purely technical response to the problem of monopoly. Thus, anti-trust legislation is subjected to a rigorous process of legal scholarship whereby the origins of certain regulatory concepts are traced to Common Law antecedents.<sup>(1)</sup> Also, the precise germination of special interpretations is located within judicial rulings sanctioned by historically determinate supreme court ratifications. This exercise, whilst valid, is basically a technical exercise internal to 'law'.

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(1) For an excellent example of this sort of interpretation see Thorelli, H. (1954) 'The Federal Anti-trust Policy' London: George, Allan & Unwin.

To be sure, a number of studies widen their scope to include an analysis of corporate structure or economic performance but the level of analysis remains purely technical.<sup>(1a)</sup> For example, there is a current pre-occupation with the so called 'economic' impact of price regulation on performance, output and so on. But the basic issue of whether or not law in general, and the specific articles of anti-trust legislation in particular, can regulate 'monopoly' is seldom countenanced. Even where the issue is addressed it is from a perspective which seems to argue for greater legal control or enforcement in apparent disregard of what will be argued is the quite limited potential of law in this respect.

On the other hand anti-trust legislation is often regarded in terms of its fundamental irrelevance to the basic issues of industrial concentration and corporate ownership. For example, Pearce, Kolko, Weinstein etc. each advance substantially similar explanations of anti-trust legislation and its fundamental irrelevance.<sup>(2)</sup> They are joined in this by a number of pessimists of a 'liberal' or 'conservative' persuasion who believe that the means for effective control of monopoly are, necessarily, incompatible with the freedom they associate with private enterprise. Accordingly, anti-trust legislation is inherently and necessarily inadequate. For whatever reason, then, anti-trust legislation is irrelevant to the problem of monopoly, or worse still, actually enables the process of concentration (Arnold) or else constitutes an ideological screen or an imaginary social order (Pearce) behind which concentration

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(1a) Although see below p. 201 et seq for a discussion of the so called 'Economic' limits to regulation.

(2) See Pearce, F. (1976) 'Crimes of the Powerful', London: Pluto Press. Kolko, G. (1967) 'The Triumph of Conservatism', Chicago Quadrangle, and Weinstein, J. (1968) 'The Corporate Ideal in the Liberal State', Boston: Beacon Press. See also Kolko, G. (1963) 'Railroads & Regulation' (1877 - 1916) Princeton: Princeton U.P.

and centralisation goes on apace.<sup>(3)</sup>

What these, admittedly diverse, proponents of anti-trust legislations' weakness fail to consider is the reason for such evident failure or, where reasons are adduced, they concern the co-optation of the regulatory machinery by the very monopolies which are supposedly regulated. In other variations the role of co-opter is undertaken by the ruling class allies or representatives of big business. Irrespective of which agency predominates it will be argued here that such explanations are necessarily inadequate as forms of social explanation and that they lack the specificity required for an accurate account of the actual failure of anti-trust legislation. Anti-trust legislation is unable to affect the process of monopolisation even in a fantasy of regulatory potency. That is to say, even if anti-trust legislation is administered impartially and with critical vigour. It is this factor which requires proper explanation.

The object of the thesis, then, is the examination of the possibility of the legal regulation of monopoly in general paying particular attention to the example of anti-trust legislation in the United States. Quite clearly, this does not constitute an exercise in legal and historical scholarship and seekers of such tracts should look elsewhere. They should find little difficulty in locating the appropriate volumes since there is a super abundance of such texts.<sup>(4)</sup>

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(3) See Arnold, T. (1962) 'The Folklore of Capitalism' New Haven: Yale U.P. and Pearce, F. (1976) op cit.

(4) For example, see Thorelli, H. (1954) op cit, also Neale (1966) 'The Anti-trust laws of the U.S.A' Cambridge: U.P.; Miller, J. (1962) 'Competition, Cartels & Their Regulation' (ed). Amsterdam and Kronstein, Miller & Schwartz (1958) 'Modern American Anti-trust Law', New York: Oceana, etc. See also Bibliography.



Likewise, the thesis is not intended as a general survey of all the ways and all the geographical contexts in which law is involved in economic affairs. It attempts, instead, to address the way in which the issues of concentration, centralisation and monopoly signalled a major transformation in the form of ownership, the ramifications of which were riven deep in American culture. It thus seeks to deal with the involvement of 'law' in the process of organisational change or adjustment by locating both the general and the specific reasons for the impotence of law in this respect.

Compared with the more conventional accounts or dismissals of anti-trust legislation this thesis starts off from a rather different perspective. After examining some of the ways in which corporate behaviour is 'criminalised' the argument commences upon what is, after all, the essential element of anti-trust legislation namely, the very issue of the legal regulation of economic affairs.<sup>(5)</sup> The mere existence of anti-trust legislation implies that 'law' and 'economy' are interrelated in a manner which enables the relationship of 'regulation' to be valid. By way of an analysis of some of the major proponents of the law/economy relationship it is argued that the regulatory relation invariably rests upon a definite conception of the 'legal' and the 'economic' as separate instances of sociality. Not only is this portrait of social relations basically inadequate but, more especially, it will be argued that this inadequacy contains within it the very seeds of the failure of anti-trust legislation.

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(5) The concept of 'criminalisation' is relevant because the Sherman Act is a criminal statute with criminal sanctions over and above the realm of civil remedy normally associated with 'regulation'. Chapter One attempts to assess the various ways in which Criminology has handled 'corporate' crime etc.

Accordingly, the principle of legal regulation is criticised on the basis of its prior assumption of a particular division of social relations into legal and economic realms and the consequences that this division heralds for the prospect of a truly viable form of regulation.

If the idea of a relationship between law and economy is an inappropriate way in which to view the question of legal and economic relations then it becomes apparent that an alternative means of regarding the issue is required. This alternative is formulated on the basis of a sociological typology of ownership. For this sort of perspective there is no reason why the 'law' of property must be viewed as something which 'engages' or is engaged in a separate form of social action. On the contrary, a general typology of ownership formulated within the auspices of sociological theory should be capable of addressing so called 'legal' and 'economic' relations from a standpoint which does not split sociality into legal and economic instances or orders.

This may be all well and good as a statement concerning the proper conduct of sociological enquiry but what has it to do with Anti-trust legislation? The answer depends upon the realisation that anti-trust legislation was concerned, at least in its initial stages, with the development of a type of 'corporate' ownership which was anathema to the pioneers of American Industry, Agriculture and Labour. Therefore, monopoly is really all about foreclosing alternative forms of 'independent' ownership whether explicitly, as in monopolisation of trade, or covertly, through conspiracy in restraint of trade. Either way anti-trust legislation appears to be an attempt to get to grips with a particular type of 'corporate' ownership insofar as it precludes a substantial measure of other

forms of ownership. Accordingly, the typology in mind is necessary for the proper demonstration of the pertinent differences between 'laissez-faire' ownership and 'corporate' ownership. These parameters are quite basic to any discussion of anti-trust legislation for they are, in effect, the central contenders.

Of course, monopoly and the corporate form of ownership are far from being identical. But there is very persuasive evidence that it was the way in which ownership was transformed from a 'bourgeois' to a 'corporate' type which was at the back of the issue of monopolisation and the 'trusts'. It was this aspect which elicited the wrath of the various real politico-social groupings which constituted the backbone of the anti-trust movement. In a word it was the manner in which ownership was held in the form of the 'trust' which enabled the growth of monopoly. Whilst it is quite conceivable that a system of laissez-faire capitalism could comprise a number of corporations, (indeed the concept of the 'corporation' is used as an American synonym for the 'company') the very nature of corporate relations of ownership is such that they generate monopolistic forms and practices by precluding large areas of endeavour from alternative forms of ownership. Thus the very essence of the trust question, and monopoly in general, is inevitably bound up with a discussion of the corporate form of ownership. Moreover, it is perhaps no accident that the form of legislation is styled as 'anti-trust' legislation for this suggests the very real measure of opposition which characterised the issue in its formative stages.

It has been suggested already that the existence of anti-trust legislation relies upon a particular conception of how law and economy must interrelate in order for legal regulation to be viable and that

this conception generates a vital weakness in any such regulatory device. Taken together with the way in which 'law' conceives of the corporate form of ownership then this reduces still further the possibility of effective regulation. For example, it is argued that within the legal system in question anti-trust legislation depends upon an implicit conception of ownership which references the central notion of private property. The fact that the concept of private property is riven through with an implicit philosophical Anthropology which ultimately relies upon individual or collective subjects as owners means that the concept of the corporate form of ownership is inadequately drawn. But this is not to say that the category of the subject is basic to all law merely that it occupies a central place in the 'legal' analysis of corporate forms of ownership. Accordingly, there is no reason why the subject must be the atom of juridic theory (as in Pashukanis) since we are concerned only with the conception of ownership and private property unfolded within a particular sort of legal system.<sup>(6)</sup> It will be argued that the corporate form of ownership depends upon the radical denial of any form of essential subject, collective subjects or even aggregates of human attributes. Thus for law to address the corporation as if it can be comprehended via a theory of (human) subjectivity is to constrict the potential of the regulatory relationship in a way which renders anti-trust legislation impotent.

The particular centrality of the subject and private property to the legal system in question is far from a general form which pervades all law irrespective of the content of any given act. On the contrary, it is the basic structure and content of anti-trust

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(6) Pashukanis, E. (1978) 'Law and Marxism', London: Ink Links.



legislation per se which is responsible for the characterisation of the corporation in terms of subjective attributes. For example, the concepts of conspiracy in restraint of trade, monopolisation and, intent, are quite basic to anti-trust legislation and they each imply certain attributes of (human) subjectivity. Therefore, the manner in which anti-trust legislation addresses the corporation, as well as the fact that regulation is seen as an essentially legal process, place certain constraints on the viability of anti-trust legislation. Of course this does not mean that law has no effect whatsoever or that a system of law which is capable of regulating 'economic' affairs cannot be constructed. Still less does it assume that law has a necessary, unalterable and inadequate structure. All that is argued is that this particular system of law, and especially anti-trust legislation and the law of property, is constrained in a way which prevents it from re-structuring the relations of 'corporate' ownership.

The argument ranged against the legal regulation of monopoly is twofold. In the first place it is argued that the conceptual structure of law in general, and the articles of anti-trust legislation in particular, is such that severe constraints are placed upon the entirely laudable objective of controlling monopoly. Law is ill-equipped to tackle the complexity of corporate interrelationships. Secondly, it is suggested that the use of law, irrespective of the concepts available to it, places further restrictions upon the possibility of controlling monopoly. In a word, even if law were supplied with concepts which respected the complexity of corporate interrelationships then the very fact that 'law' is seen as a separate agency of review would limit the potentiality of legal regulation. Whereas the former is argued in the strong sense of the word the

latter is more agnostic concerning the possibility of effective regulation.

Finally, it will be argued that the 'failure' of anti-trust legislation, since it is due to quite specific constraints, does not reduce to the existence of a conspiracy between big business and government. On the contrary, the anti-monopoly movement was an authentic political movement subject to definite organisational contingencies which do not collapse into the overall movement of history or the class struggle. Accordingly, the anti-monopoly movement will be analysed according to its radical independence which, at least for a time, challenged the very basis of the corporate form of ownership.

At this point it is perhaps as well to issue a number of disclaimers. First of all, it should be re-iterated that anyone who expects to find here a detailed examination of anti-trust legislation in action should look elsewhere. This is relatively easy since there are any number of texts which attempt exactly that. The intention behind this thesis is to concentrate more on the way in which the concepts and the various controversies of anti-trust legislation depend upon a distinct vision of what the corporation is like. This vision reproduces the corporation in a fashion which is wholly inadequate to the further regulation of corporate conduct. And this goes a long way toward accounting for the relative failure of anti-trust legislation irrespective of how and whether such legislation is enforced or interpreted. Secondly, there will be further disappointment if the thesis is viewed as an historical study of the Granger, Populist or Progressive movements. The purpose of the final chapter is to demonstrate that the anti-monopoly movement cannot be written off as an irrelevant adjunct to a real conspiracy between

big business and the state and that the movement had an authentic organisational structure of its own. In this sense the argument is no more than a suggestion that there are alternative ways of looking at the issue. In short the chapter is not concerned to describe the 'emergence' of anti-trust legislation in any great detail nor should the thesis be viewed as an historical account of Agrarian society or the roots of American Individualism. There are volumes which claim this as an objective but this is not one of them.

Finally, the demonstration of a typology of ownership is intended merely to facilitate the description of, and the contrast between, two definite types of ownership. It is not intended as a general survey of several modes of production or types of society. Accordingly, feudal and soviet relations of ownership are included only inasmuch as they demonstrate the potential versatility of the typology in question.

## CHAPTER I

### ORGANISATIONAL CRIME AND CRIMINOLOGY



In an attempt to widen the focus of criminology and to render its concepts more inclusive attention has increasingly centred on white collar crime, organised crime, crimes of the powerful and, more recently, criminal organisations, institutions and fractions of 'Capital'. Whatever the particular focus this tendency would seem to evince a dominant motif, namely, the assumption that crime is committed as a direct reflex of corporate forms of organisation, hierarchically ordered professional structures or, more simply, in the pursuit of an occupational role. The presence of this generally reflexive context apparently justifies the classification of crime as white collar crime, corporate crime, occupational crime or organised crime rather than as crime per se. In other words, the thematic unity of the area is secured by the application of a common epithet, accordingly, the concept of crime is qualified in roughly the same manner throughout. A very important consequence follows on from this, that is, the form of organisation is crucial to the definition and explanation of the existence of this specific type of criminality which, for the sake of argument, can be termed 'organisational crime'. Thus, in order to define 'organisational crime' it is necessary to reference some form of organised structure and in order to explain 'organisational crime' an analysis of the structural features of organisation is required. For example, even Ross' concept of the 'criminaloid' implies relations of super/subordination and hence some concept of structural organisation.<sup>(1)</sup> Otherwise we end up with the rather simple statement that 'powerful' people or organisations or presidents commit crimes full stop. Crimes

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(1) Ross, E. (1907) 'The Criminaloid' in The Atlantic Monthly, 99 pp. 44 - 50.

of the powerful may be exposed by this procedure but they remain substantially unanalysed and it is perhaps this defect which tends to characterise some of the major architects of the field.

The particular strand of Criminology which takes 'organisational crime' as its object has increasingly referenced and come to rely on certain concepts - power, state, capital, class and, lately, totality - as the intellectual crutch with which to sustain what, arguably, remains a rather shaky endeavour. It is necessary to ask, however, whether these concepts are entirely adequate, whether they are used in an appropriate manner and what effect, if any, their incorporation has on the overall structure of 'criminology' as a discipline. These issues are both fundamental to the proper location of the corporate violation of anti-monopoly law within sociological analysis and to the construction of what Taylor, Walton and Young would describe as a fully social theory of crime and law.<sup>(2)</sup>

The area of criminology conventionally described by an abiding interest in 'white collar crime' signalled a major contribution by the exemplary manner in which the concept of 'social structure' achieved an unequivocal place on the criminological agenda. Thus Newman makes the following observations: "The most important theoretical implication of white-collar crime is that it presents a problem almost exclusively sociological ..

.. To comprehend it adequately a fundamental knowledge of class structure, values, roles and statutes, and the many other essentially social process' and concepts, is needed".<sup>(3)</sup> He goes on to say that

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(2) Taylor, I. etal (1973) 'The New Criminology' London: R.K.P.

(3) Newman, D. (1958) 'White Collar Crime: An Overview and Analysis' in Geis, G. & Meier, R.F. (1977) (eds.) 'White Collar Crime' New York: Macmillan, p. 60.

".. the concept of white collar crime has forced the theoretician into an analysis of highly complex and very abstract relationships within our social system"<sup>(4)</sup> Finally, and perhaps most pertinent of all, he argues that "whether he likes it or not the criminologist finds himself involved in an analysis of prestige, power, and differential privilege"<sup>(5)</sup> This call for a wider criminological horizon echoes quite generally amongst those concerned with 'organisational crime' as a topic. After all, Sutherland was at great pains to emphasise the general nature of his theory of crime and law and again the superabundance of 'structural' terms attests quite convincingly to the general persuasion as to their relevance. Notwithstanding this clear articulation of relevance there is an equally transparent failure to measure up to the more stringent requirements set by the overall tenor of the enterprise. A brief examination of the sorts of explanation commonly adduced for the a-criminalisation of organisational crime reveals a whole host of inherent ambiguities which go a long way toward accounting for the relative failure of what remains a laudable attempt.

The most common explanation afforded to the relative immunity of 'white collar' criminals is to be found in the class bias of the court and the prevailing influence of the 'powerful' in molding the criminal law according to their own interests. For example, Kolko asserts that the involvement of big business in the drafting of 'Railroad' legislation was a major factor leading to the attenuation of law in this respect.<sup>(6)</sup> Likewise Sutherland argues that:

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(4) ibid p. 63.

(5) ibid p. 56.

(6) Kolko, G. (1963) 'Railroads and Regulation' 1877 - 1916, Princeton: Princeton U.P.

"White collar criminals are relatively immune because of the class bias of the courts and the power of their class to influence the implementation and administration of the law".<sup>(7)</sup> Such immunity is both an analogue of respect and prestige but also derives from the cultural homogeneity of legislators, judges and administrators and their congruence with businessmen. Conspiracy of this order, albeit latent, reaches its apo<sub>u</sub>theosis in the assertion that certain presidential regimes, for example, McKinley, Harding, Hoover and Coolidge, were 'friendly' to business and, therefore, their administrations correlated with a low incidence of Criminal prosecution of business activity. As a corollary the climate of 'trust busting' is associated with an identifiable hostility toward 'big business' on behalf of particular administrations, the example of T. Roosevelt is often used in this respect.<sup>(8)</sup> One thing these interpretations share is an equal commitment to the idea that public policy is but an outward manifestation of the self conscious attitude of a political regime or a homogenous elite. What is more, self consciously formulated attitudes are seen as an index of real regulation and successful criminalisation of corporate activity: an assumption which is arguable to say the least.

To be sure there are more sensitive and indeed opposite explanations to be found and Newman is a prime example of an important, but nevertheless incipient, tendency: "The diffuse nature of the perpetrator (the corporate body), as well as the diffuse nature of the victim (the public), does not fit many white collar cases to the

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(7) Sutherland, E. (1940) 'White Collar Criminality' in Geis & Meier (1977) op cit p. 44.

(8) See Hofstadter, R. (1955) 'The Age of Reform' New York: Vintage p. 238 & p. 246 on the largely undeserved character of this epithet.



normal criminal format. Then, too, the virtual absence of intent, of mens rea, on the part of the violators makes criminal sanction seem inappropriate".<sup>(9)</sup> Even here the fact that Newman finds it necessary to preface such a revealing remark by the more conventional - "The relatively infrequent use of criminal sanctions is undoubtedly a reflection of many factors including the high social status of many violators and the lack of consensus about the criminal nature of their behaviour"<sup>(10)</sup> - would seem to suggest a sense of paralysis in the analysis of 'organisational crime'. A form of paralysis which structures explanations around a series of highly ambiguous and wholly inadequate concepts and which has, as its underlying cause, the entirely inappropriate relationship of sociology to criminology: Sociology is seen as a resource made available to criminology in the interstices of explanatory seizure.

Other sorts of explanations may be characterised by the idea that government was impotent in the face of a business plutocracy which would simply 'take over' at the slightest hint of government moves against its interests,<sup>(11)</sup> or the somewhat simple assertion that 'corporations are powerful social forces' - as if that explained anything at all!<sup>(12)</sup> Further, the essentially Weberian argument that formal and complex rational law often favours 'corporate'

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(9) Newman D. (1958) op cit p. 54.

(10) ibid p. 54.

(11) See Sumner, W.G. (1963) 'Democracy and Plutocracy' in Stow Persons (ed), 'Social Darwinism: Selected Essays' New Jersey: Prentice Hall, pp. 143 - 149.

(12) Geis, G. & Meier, R. (1977) op cit p. 66.

bureaucracies is given new form in the assumption that specialist corporate lawyers invariably run rings around government prosecutors (Braithwaite) and the idea that foreclosing loopholes is self defeating given the fact that complexity favours corporate organisations (Pepinsky).<sup>(13)</sup> Yet again the idea that the a-criminalisation of organisational crime is to be found in the location of the relevant statutes in civil rather than criminal codes (Geis and Meier) is perhaps slightly disingenuous given the number of activities which are in principle criminalisable, for example, the Sherman Act provisions.<sup>(14)</sup> Furthermore, Tafts argument that the social system compels the business institution to be exploitative and at times even criminal and Quinney's assertion that deviant behaviour is a reflection of social structure appear to say a lot without explaining anything at all, evincing a conception of social structure which at once explains everything and nothing: criminal totalities replace identifiably human authors of criminal action.<sup>(15)</sup>

Others have attempted to salvage the essential ambiguity of the concept of 'white collar crime' rather than explain its causal antecedents. Of these the most important is undoubtedly Aubert who argues that the controversial nature of white collar crimes "... is exactly what makes them so interesting from a sociological point of view and what gives us a clue to important norm conflicts, clashing group interests, and maybe incipient social change. One main benefit to be derived from the study of white collar crimes springs from the opportunity which the ambivalence in the citizen, in the businessman and among lawyers, judges and even criminologists offers as a barometer

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(13) See Braithwaite, J. (1979) Transnational corporations and corruption in 'International Journal of the Sociology of Law 7,' p. 133, and Pepinsky, H. (1976) 'Crime and Conflict' London: Martin Robertson.

(14) Geis, G. & Meier, R. (1977) op cit.

(15) Taft, D. (1956) 'Criminology' New York: Macmillan and Quinney, R. (1963) 'Occupational Structure and Criminal Behaviour' in Social Problems 11, pp. 179 - 185.

of structural conflicts and change potential in the larger social system of which they and the white collar crimes are parts".<sup>(16)</sup>

More recently, Carson has attempted to recover the ambiguity of white collar crime by arguing that its ambiguity can become institutionalised in the space between the movement of the 'totality' and the historically specific organisational forms, for example, the factory which collide at various points with the seemingly inexorable logic of the totality.<sup>(17)</sup>

One thing these various attempts seem to imply is that sociological theory is at its most incisive at the margins of legitimacy and illegitimacy and that further, the contradictions inherent in the concept of white collar crime offer a unique insight into social structure or the workings of the totality. A peculiar form of sociology indeed where relevance is confined to the margin and importance reigns supreme only when the mask slips: a kind of sociology of error or, a sociology limited to the measure of ambiguity rather than regularity. Furthermore, the way in which the concept of 'totality' insinuates itself into the explanatory framework is perhaps one more example of the way in which the repertoires of criminology, whilst exhausted in the face of complexity, are replenished through a parasitic relationship to sociology, Marxism and political economy.

Still others have sought to question the elasticity of the concept 'crime' and, therefore, the very basis of the field of 'organisational crime'. Thus the classic 'debate' between Sutherland and Tappan takes place against a backcloth of the essentially positivist concern for the differentiation of criminal and non-criminal action.<sup>(18)</sup>

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(16) Aubert, V. (1952) 'White Collar Crime and Social Structure' in Geis and Meier (eds) (1977) op cit. p. 172 (Additional emphasis).

(17) Carson, W. (1980) 'White Collar Crime and the Institutionalisation of Ambiguity: The Case of the Early British Factory Acts' in Geis, G. & Stotland, E. (eds) 'White Collar Crime: Theory & Research' California: Sage.

(18) See Sutherland, E. (1945) 'Is "White Collar Crime" Crime?' in the American Sociological Review, 10. pp. 132 - 139 and Tappan, P. (1947) 'Who is the Criminal?' in American Sociological Review 12 pp. 96 - 102.

They both share a deep seated concern for the criterion of criminality and hence for the basis for specifying a violation of the criminal law. Whilst Sutherland argued that white collar crimes are real crimes and that the prevalent use of administrative agency merely parallels the bureaucratic response to juvenile delinquency. Tappan argued that real crime should be restricted to the statutory definition of crime and the actual processing of criminals through the criminal justice system. Otherwise, as he puts it, "the rebel may enjoy a veritable orgy of delight in damming as criminal most anyone he pleases".<sup>(19)</sup> Tappan's position would indeed find limited support amongst those dissatisfied by the characterisation of Standard Oil, or General Motors as criminal organisations and those not convinced by the efficacy of 'reversing' the arsenal of criminal sanction. For example, Clark highlights the absurdity involved in such a 'reversal': "Presidents, congressmen and corporation bosses on long-term prison sentences for tax frauds, illegal profiteering, and war-mongering, while petty thieves freely wander the streets attending occasional and voluntary, therapy classes".<sup>(20)</sup> Pepinsky makes a similar point in arguing that the 'debate' between Sutherland and Tappan hinges upon the definition of relevant social injury rather than the existence of social injury per se. Therefore, Pepinsky attempts to extend Sutherland's classification of white collar crime as real crime; a definition which he argued was gripped by a particular form of socio-economic bias and hence partial definition of social injury. Pepinsky's definition of white collar crime would include the concept

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(19) ibid p. 98.

(20) Clark, D. (1978) 'Marxism, Justice, and the Justice Model' in Contemporary Crises, 2. p. 53.



of exploitation based on a definition of private property as a 'superior' right. Exploitation is the infringement of a superior right, these rights are enshrined as property rights which in turn provide the basis for a definition of white collar crime.<sup>(21)</sup> This approach echoes that of Macpherson who also attempts to extend the concept of private property to encompass a whole series of 'basic' rights the violation of which is a crime.<sup>(22)</sup> Ultimately, however, the definition of white collar crime as exploitation is gripped by an inherent circularity in that exploitation implies the priority of certain (proprietary) rights over other (proprietary) rights and hence the problem of relative social injury. If a selection of relevant social injury is to be avoided then an absolute concept of social injury and an absolute definition of (proprietary) rights is required. Apart from the advocates of transcendental and absolute justice such a concept would not find any particular favour.

These are the 'general' sorts of explanations and issues which tend to characterise criminological attention to 'organisational crime'. I would like to concentrate in more detail on a specific attempt to break with the conventional criminological approach to this area, one which has as its dominant motif the idea of a Marxist analysis of organisational crime. It can be argued that in seeking to extend the frontiers of criminology in this way, through an articulation of Marxist concepts, the inherent contradictions of the field, evident in themselves, become all the more sharply revealed. The criticism is offered not as a negative assertion of the 'irrelevance' of the field of 'organisational crime' - whether for Marxism,

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(21) Pepinsky, H. (1976) op cit.

(22) Macpherson, C. (1975) 'Capitalism and the Changing Concept of Property' in Kamanka, E. & Neale, R. (eds) 'Feudalism, Capitalism & Beyond' London: Edward Arnold.

criminology or sociology - but rather as a prologue to, what is perceived as a more acceptable programme of research oriented toward the specific problem of the corporate violation of anti-monopoly law.

### Beyond 'organisational' Crime and Criminology.

The most recent, and arguably the most developed, exponent of 'Organisational Crime' is Frank Pearce who, in *Crimes of the Powerful* and *"Crime Corporations and the American Social Order"*<sup>(23)</sup> presents a fully developed combination of criminology and political economy. For the most part Pearce is concerned with three major themes. First of all, that the American economy has not been based on free enterprise since the late nineteenth century. As such he is presenting an internal critique of legitimization ideologies based on the persistence of free enterprise, that is, based on an "imaginary social order". Secondly, he deals with the "criminality" of big business in the sense of its direct involvement in "criminal" acts, for example, Standard Oil in its formative years. Thirdly, he examines the ability of big business to enact legislation in its favour; to skew enforcement procedures to its advantage; to refocus anti-trust law from monopoly practices onto unionization and, finally, to encourage the growth of racketeering within, or in opposition to, the labour unions. In this sense his work provides an opportunity to examine both the possibility and the consequences of the combination of criminology and political economy.

Two main questions must be borne in mind with regard to such an enterprise. One, how must criminology be constituted in order that

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(23) Pearce, F. (1976) *'Crimes of the Powerful'*, London: Pluto Press; Pearce, F. (1973) *'Crime, Corporations and the American Social Order'* in Taylor, I. & Taylor, L., (eds.) *Politics and Deviance*, Harmondsworth: Pelican.

it can address the "powerful" and with what consequences for criminology in general and two, has Crimes of the Powerful reformulated criminology so that it can achieve its objective? These two general questions locate Pearce's work in relation to the "criminology of the powerful". More specifically Pearce's work will be situated in relation to two criteria:

1. Its internal consistency or accuracy both theoretically and empirically, that is, historically.
2. Its overarching theoretical adequacy or validity.<sup>(24)</sup>

These twin criteria, it will be argued, provide the grounds for a continuous critique of the Crimes of the Powerful through an examination of its handling of the specific areas of capital, the state, history and empirical evidence. They also serve to demonstrate the exact range of inconsistencies and problems generated by the conjunction of two areas - political economy and crime. The critique is extended by the attempt both to offer a concrete alternative account of anti-trust legislation together with a basis for the proper conceptualization of crime and law within political economy.

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(24) It is one of the problems of the eclectic nature of Crimes of the Powerful and indeed of the "criminology of the powerful" in general, that it admits of various levels of critique. That such a critique exists on several different levels means that it is caught between theoretical refutation; factual inaccuracy; and factual refutation in terms of different or opposed facts derived from a different theoretical approach or problematic. The fundamental question of the level of proof or the degree of adequacy is ambiguously grounded in neither theory nor data. This is not to deny that the major critique of the "criminology of the powerful" is theoretical, nor to represent this critique as an arbitrary juxtaposition of levels, but to point to the existence of several layers and to the contradictions and inconsistencies between them. The task then becomes one of subjecting those various levels, and the inconsistencies between them, to a theoretical critique - namely on the basis of the possibility of "combining" disciplines or "borrowing" concepts as between criminology and political economy.



Crimes of the Powerful is committed to an instrumentalist conception of the state with all the consequences for theoretical and political practice entailed in that position. It will be argued that Crimes of the Powerful is internally inconsistent in its application of this problematic - both in the sense that it embraces an element of state autonomy and, in relation to the highly selected realm of empirical material. Moreover, the two series of problems - internal inconsistency (both conceptual and empirical) and the theoretical failings of the instrumentalist/idealist couple itself - stem directly from the contradictory relationship established between political economy and criminology.

Throughout Crimes of the Powerful there exists the presence of "big business", a presence that somehow functions as the ultimate, if not the proximate, explanation of events. For instance, big business was in "control" of the major political parties, the federal legislature, the federal agencies, and so on. Implicit in this is the idea that the state apparatus was in some way controlled by big business. In this formulation, Pearce appears to reify the state as something to be captured, as a powerful instrument to be used by big business. It follows that the state is quite clearly established as a "thing" rather than as an "autonomous subject". This commitment to one side of the couple - state as thing/state as subject - is at the heart of the problem. Pearce's resolution of it in favour of an instrumentalist conception of the state cannot even do justice to the complexity of the "empirical" evidence that he uses, nor is it a consistent resolution. Further, as Poulantzas demonstrates, it is the instrumentalist/idealist couple itself, that is, independent of any commitment to one side or the other, that entails a conception of the state as an entity possessing its own power. The hegemonic fraction of capital is then free to either absorb the state's power, through fusion with it, or be resisted by the state's power



involving the independence of, or arbitration by, the state.<sup>(25)</sup>

That Pearce advocates the fusion thesis is only central to the question of consistency and application, it is not central to the question of adequacy. What is central to the determination of theoretical adequacy is the overall location of Crimes of the Powerful within the idealist/instrumentalist couple itself, a couple which generates the conception of the state as guardian of its own power. Instead, for Poulantzas, "The state does not have its own 'power', but it forms the contradictory locus of condensation for the balance of forces that divides even the dominant class itself, and particularly its hegemonic fraction - monopoly capital."<sup>(26)</sup>

The thesis of state power is far from settled for political economy and the fact that Pearce treats it as if it were is of crucial importance to the conditions under which criminology and political economy can or cannot be conjoined. Moreover, Crimes of the Powerful is inconsistent in its formulation of a theoretical position, inconsistent in the application of that position to a series of data, and is unaware of the problems generated by the formulation of the position in that way. These systematic silences and anomalies, it is argued, betray the contradictory relationship between political economy and criminology.

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(25) For Poulantzas it is the "complex contradictory unity in dominance" of the several dominant fractions that explains "... how the concept of hegemony can be applied to one class or fraction within the 'power' bloc. This hegemonic class or fraction is in fact the dominant element of the contradictory unity of politically 'dominant' classes or fractions, forming part of the 'power' bloc". (N. Poulantzas (1973) p. 237) Whilst having no explicit concept or theory of the "power bloc", and hence no conception of the hegemonic class or fraction, it is quite clear that the position occupied by hegemonic class or fraction in relation to the state would, for Pearce, be occupied by "big business" See Poulantzas, N. (1973). Political Power and Social Classes, London: New Left Books.

(26) Poulantzas, N. (1975). Classes in Contemporary Capitalism, London: N.L.B., p. 158 - 159.

Attendant on the failure to adequately derive a concept of the state is the lack of any explicit division within capital itself. Capital is simply left as an unfractured whole and its conditions of existence conceived as a unity. For, Crimes of the Powerful there is only big business; the rest is reduced to nothing. As will be seen, there is, in Crimes of the Powerful an implicit demonstration of the empirical consequences of different fractions of capital, of a clash of political interests relating to diverse conditions of existence. Nevertheless, these remain outside the theoretical display since they are not part of Pearce's central concern namely - the demonstration of the total dominance of big business. There is a contradiction between the concept of capital used and the range of empirical evidence which implies a rather different concept of capital. Accordingly, the theoretical analysis is at variance with the empirical display, that is, two series of inconsistencies intersect.

Alongside the problem of the state and the unitary concept of capital is the ahistorical approach of Crimes of the Powerful. There is little attempt made to confront the differential relationship between the conditions of existence of various capital fractions and the forms in which they are secured through time, that is the differential "mobilization" of state and federal levels in relation to the historical displacement of the conditions of existence of non-monopoly capital by those of monopoly capital. This particular silence leads Pearce to adopt an ahistorical subsumption of all interests to big business at all periods under consideration thereby ignoring the dynamic development of the monopoly capital form. Furthermore, as Pearce is committed to an instrumentalist view of the state and its relationship with big business this presupposes a prior separation of the two. This separation, whilst necessary for Pearce,

is nowhere demonstrated in the analysis. The omission is two tiered for there is also no indication of any prior instrumental relationship between the state and, for example, entrepreneurial capital; big business is simply projected backwards in time as if it had always controlled the state. Therefore, the analysis of the historical derivation of the state is inadequate and inconsistent in relation to the theoretical concept of state power.

The range and treatment of sources by Crimes of the Powerful suggests two things: One, the inadequacy of the concept of merger and two, that the empirical evidence is at variance with the argument. For instance, when he states that mergers were largely completed by the beginning of the twentieth century Pearce ignores two factors:

1. The "empirical" fact that there were three merger booms; 1898 - 1902; 1925 - 1929; 1955 - 1969, corresponding to three definite moments within the formation of monopoly capital. Namely: a) The phase of relative transition from relations of production characterized predominantly by non-monopoly capital to relations of production characterized by the pre-eminence of monopoly capital; b) The phase of consolidation of the conditions of existence of monopoly capital; c) The phase representing the partial re-integration of economic ownership and possession signalling a new conjuncture



of increased political conflict.<sup>(27)</sup> In short mergers were not "completed" by the beginning of the twentieth century and, more importantly, mergers occurred after they had supposedly finished. Mergers which had a very precise theoretical significance, that is, they were far from small scale and negligible as Pearce seems to suggest.

2. The crucial distinction between economic ownership - the ability to assign the means of production and to allocate resources and profits to this or that use - and economic possession - the direction and relative control of a certain Labour process - is lost to Pearce. In effect the distinction indicates that possession is not a necessary pre-condition for control, for example subcontracting, oligopoly, minority shareholder control and price leadership all represent effective forms of economic control of the market. So that to argue the completion of mergers is to say very little. Not only is this very dissociation

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(27) Beman, L. (1973) "What We Learned from the Great Merger Frenzy", Fortune April 1973 p. 70 - 150. The three merger booms may be described as follows:

- (i) The first merger movement was, conventionally, caused by the business failures of the 1890s together with the proliferation of railways, telegraph and telephone leading to the establishment of the first truly national markets. The dominant types of monopoly organization were trusts, mergers and combinations which in many industries embraced all existing capacity, that is more than 90%. Pearce is quite correct in stating that the basic corporations were established prior to merger mania.
- (ii) The second movement was governed largely by the parallel responses of separate organizations. The 1929 peak extended the domain of big business to new industries and created numerous vertically integrated enterprises, that is the consolidation of monopoly capital. The conventional cause was the shift to autos and trucks with the consequent enlargement of markets and the destruction of local monopolies.
- (iii) The third movement was more of an extended trend starting in the 1950s and peaking in 1968. The process produced the giant conglomerate form signalling in part the re-integration of economic ownership and possession with the co-incident elevation of the problem of the multi-national companies to the political agenda. Of course effective control still extended beyond possession.



of economic ownership from economic possession a consequence of the relative transition from competitive to monopoly capitalism, that is, it denotes a particular phase of monopoly capitals formation, but it also means that the process of concentration and centralization of capital are effected under forms that are often hidden by legal ownership.<sup>(28)</sup> To place such store by the concept of merger in the light of the above considerations is to reveal a theoretical deficiency associated with a poorly specified empirical content - in that "mergers" were not completed anyway. Where he does raise the problem of other means of control he does so in terms of the subordination of all else to big business. The process fulfills a different function within Pearce's theoretical framework since it serves to establish the absolute domination of big business rather than its conditions of existence and mode of operation in the market. Although monopoly capital did, in effect, "control" large sections of industrial production and distribution through merger and economic possession there were still significant sectors that were not "controlled" by monopoly capital.

#### Anti-Trust Legislation

So far the problems which the state, capital, history and empirical material raise for a criminology of the powerful have been discussed separately. It is now necessary to consider to what extent they intersect in relation to anti-trust legislation. In the process one can trace the existence of continuities with other revisionists, continuities that are not accidental but rather

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(28) The centralization of capital is defined by growth through merger and combination whilst the concentration of capital is defined by the growth of separate companies.

reveal the same fundamental problem - namely the conflation of cause and effect.

In any analysis of anti-trust legislation it is necessary to draw a distinction between the anti-trust movement and the effectiveness of anti-trust enterprise. Pearce concentrates on the function and effect of anti-trust legislation and thereby ignores or reduces the anti-trust movement. Two statements serve as an occasion for analysis: 1) that "The attitude of the large corporations to the anti-trust laws developed from hostility in the late nineteenth century to an active involvement in their administration by 1914,"<sup>(29)</sup> and 2) that "The corporations became aware of their precarious position in relation to the federal government and at the same time were recognizing their vulnerability to prosecution by socialist state legislatures"<sup>(30)</sup> and consequently they agitated for a "transfer of these powers to the federal level where they would be able to effectively control the implementation of Federal regulation of their activity".<sup>(31)</sup> Several points of interest arise "internally" from these statements.

First of all, the large corporations "hostility" to anti-trust legislation implies a certain degree of effectiveness in such legislation, an element of "threat" to the corporations. There existed, therefore, a period in time when anti-trust legislation or enterprise was not enacted by, nor under the control of, big business

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(29) Pearce, F. (1976), op cit., p. 85.

(30) ibid. p. 88.

(31) ibid. p. 86.

and, as a result, was in a position to challenge its conditions of existence. Anti-trust legislation and, more especially the anti-trust movement cannot, therefore, be reduced to its control by big business since its prior independence is at least implied if not argued by Pearce. Yet Pearce explicitly argues the opposite namely, anti-trust is reducible to its functionality for big business.

Secondly, vulnerability to prosecution by state legislatures indicates the existence of significant interests opposed to the mergers and, in addition, suggests that since enforcement of anti-trust legislation could be controlled more effectively at federal than at state level, the federal/state split is an index of the division within the "power" bloc and an admission of the effectivity of political conflict.

Thirdly, the overall emphasis which Pearce places on the appropriation or control of anti-trust by big business explains away any possibility of anti-trust legislation being the product of political class struggle. The importance of class struggle is simply ignored in favour of the overwhelming, all pervasive dominance of big business. Origins are collapsed into ends.

From these critical comments and elements of inconsistency alone it is possible to construct the existence, at the political level, of an "anti-monopoly alliance" comprising socialist, populist and entrepreneurial fractions that formed the anti-trust movement. As Hofstadter notes "often a common hostility to big business was the one link that bound together a variety of interest groups that diverged on other issues".<sup>(32)</sup> This political alliance, once established, could be said to function, at least for a time, in

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(32) Hofstadter, R. (1955). The Age of Reform, N.Y.: Random.

opposition to the conditions of existence of monopoly capital, an opposition that was located in many significant respects in the federal/state split.<sup>(33)</sup>

There are several points at which Pearce's formulation implies or allows alternative interpretations. Alternatives which derive as much from internal theoretical inconsistencies as from the particular choice of evidence. For example, in opposition to the earlier "fusion" thesis - regarding the relationship of the state to big business - Pearce erects the conception of the "states" short term autonomy vis-a-vis a section of the ruling class in the interests of the whole ruling class. As was demonstrated at the outset this is merely a change in terms since the couple which allows the state to be conceived in terms of having its own power is retained, that is, it is common to both the fusion and arbitration variants. "Big business" was, therefore, simply "restrained" in order that the system of hegemony vis-a-vis the dominated classes was not challenged. But by whom or by which class or combination of classes or fractions and indeed by what process? Pearce cannot answer this because his conception does not contain any extended analysis of the power bloc he has in mind.

There are, then five components to Pearce's analysis of anti-trust:

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(33) For instance, the laissez-faire policy of federal government, that is its non-intervention, aided - or at least did not prove an obstacle to - monopoly capital, especially where interstate monopolies were concerned. This, coupled with the more interventionist stance of local state policy towards monopoly capital's conditions of existence - albeit an ineffective intervention since state boundaries did not constitute an obstacle to monopoly capital in its corporation form - firmly establishes the basis for a division along federal state lines. Although Pearce makes nothing of this, preferring instead to rely on the domination of the federal government by big business as the explanation of any division.



1. Mergers were effectively complete and, therefore, anti-trust was ineffective.
2. Mergers made a dramatic impact and there was a consequent need to assuage radical socialist and populist demands - demands that are not theorized at the political level but are merely referenced by Pearce.
3. The appropriation, co-optation or emasculation of anti-trust legislation by big business.
4. Mergers involved only one section, presumably big business, of the ruling class and the whole ruling class made its presence felt in opposition to big business in the general interest of long term survival.
5. The active involvement of big business in the advocacy of anti-trust legislation with the result that anti-trust becomes a front behind which the market is ordered and structured in the interests of big business.

These five components are positions made explicit at various points in *Crimes of the Powerful*. They represent the more or less ad hoc importation of an eclectic series of explanations or accounts borrowed in the main from revisionist history.<sup>(34)</sup> In themselves these accounts are not necessarily contradictory and thus Pearce is able to maintain their mutual articulation without too much trouble.

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(34) By "revisionist history" I refer, in the main to the work of: Kolko, G. (1967). *The Triumph of Conservatism*, Chicago: Quadrangle; Wiebe, R. (1967). *The Search for Order*, New York; Weinstein, J. (1968). *The Corporate Ideal in the Liberal State*, Boston: Beacon Press; Appleman Williams, W. (1961). *Contours of American History*, New York: World Publishing; Hofstadter, R. (1955), *op cit.* There are, of course, significant differences between these various authors although these remain internal variations within what is here described as "revisionist history".

What is important is that these various components, taken together with the positions which are either implicit or logically entailed in Pearce's work, reveal the fundamental absence of any critical comment on the concepts and theoretical systems introduced willy nilly into the area. The absence of a theoretical framework derived in the first place from political economy introduces the range of inconsistencies and contradictions that cloud a "criminology of the powerful". That such inconsistencies are registered at an overtly concrete level is evidenced by the apparent need to buttress Crimes of the Powerful with an eclectic reading of Revisionist history. The inadequacy of the concepts results in a retreat into history which, far from producing a solution, simply re-inforces the inconsistencies already there.

The historical sources for Crimes of the Powerful are supplied by revisionism in general and the work of Kolko in particular. Accordingly anti-trust legislation is seen as part of a conscious strategy advocated by big business and engineered by a powerful elite with a view to the rational stabilization of an increasingly competitive market. As a result big business controlled itself through the agency of a unified elite rather than being controlled by anti-trust enterprise. This formulation offers a voluntaristic, conspiratorial conception of big business in terms of a series of interlocking elites with the result that a reified political strategy on one side is arbitrarily "coupled" with an abstract economic "need" or "necessity" on the other. Furthermore, the perception of an "increasingly competitive market", which supposedly contains within itself the "need" to be rationally organized, is based upon a series of misconceptions; of the conditions of existence of monopoly capital; of its "eventual" compatibility with "elements" of competition and; of the increasing "anarchy" of monopoly capital production (Lenin).

Thus we now arrive at the more general theoretical implication of Crimes of the Powerful in that anti-trust legislation is now seen as a product of the whole ruling class in the interest of the long term survival of the capitalist system as a whole. This position assumes an internal discipline within the power bloc itself together with the historical subservience of big business to the general capitalist interest. It is characteristic of this position that it can take one of two general forms involving either the relative autonomy of state power in relation to its function of organizing factor of, or for, the "ruling class" or, the pre-given internal consensus of the ruling class and its simple translation into state power through fusion with it. As a result anti-trust can be viewed as an anticipation of harsher measures, as a reaction to the reform movement or, finally, as the self-organizing principle of the capitalist system.

It is inherent in the method of Crimes of the Powerful that the inconsistencies generated within the concept of "state power"; that is, the failure to produce a consistent resolution of the concept in terms of either instrumentalism, idealism or even relative autonomy; leads Pearce to attempt to bury those inconsistencies in the apparent anarchy of empirical history. The decision to engage revisionist history in the form of Kolko leads inexorably to the demonstration of the relative autonomy of the capitalist class as a whole vis-a-vis big business in particular. This relative autonomy occurs within and on the basis of the more general fusion of the capitalist class and state power. This formulation is upheld notwithstanding the persistent reduction of state power to big business alone. Whilst being consistent in the adherence to "state power" as a concept the internal variations within that concept develop severe contradictions which are only compounded by the

retreat into historical empiricism.

The preceding analysis has shown that 'Crimes of the Powerful' is incapable of handling the concepts of big business, power and the state. That Pearce is aware of the problems is clear:

Thus the ultimate implication of this mode of analysis is the dissolution of criminology as a separate discipline.<sup>(35)</sup>

Thus in analysing 'crimes of corporations' we are ultimately led to ask fundamental questions about the nature of America and the worlds 'free enterprise system'.<sup>(36)</sup>

That neither the conditions nor the consequences of the dissolution of criminology are specified and that Crimes of the Powerful fails to ask fundamental questions of the "free enterprise system", let alone provide a framework for an answer, is perhaps a function of the relative incompatibility of criminology and political economy. Moreover, by implying the end of criminology the question of the proper formulation of the "powerful" is redundant, whilst the conditions under which crime and law can become central to Marxism are assumed to be covered by an eclectic combination of concepts. Crimes of the Powerful is, therefore, left in a theoretical vacuum since it belongs neither to criminology nor to political economy. Once the question is posed in these terms, as a relation between criminology and Marxism, then the solution is quite clear.

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(35) Pearce, F. (1976) op cit. p. 80.

(36) ibid, p. 105.



If a "criminology of the powerful" were at all adequate to its object then quite simply it would cease to be "criminology".

The problems of Crimes of the Powerful are conceptual and logical. They can, in the end, be reduced to two, one the imperfect and ad hoc translation of political economy's concepts into criminology and two, the failure to address the contest within political economy concerning the nature of the state, capital and the interrelation, or even separate existence of the political and economic levels. This last carries the assumption that such debates either do not exist or can effectively be ignored for the purposes of a "Marxist" criminology. The position argued here is that not only can those debates not be ignored but further such ignorance obscures the conditions under which crime and law can become central to political economy - namely by theorizing law and crime in terms of their centrality or otherwise to the reproduction of the conditions of existence of determinate relations of production.

It will be readily apparent that the purpose of this 'introductory' chapter is to reject those forms of analysis which deploy the concept of 'power' or the 'powerful' as an ultimate source of coherence between otherwise disparate phenomena, or else which view the concept as a supplementary explanation of residual anomalies.<sup>(37)</sup> More especially the concept of 'power' is often conceived in behavioural terms as the hydraulic fluid responsible for the transmission of the desires of 'business' to the organs of state reception and response. 'Power', therefore, attains an almost

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(37) See Cain, M. (1979) 'Trends in the Sociology of Police Work' in International Journal of the Sociology of Law. 7., for a criticism of this approach.

mystical or transcendental form at once ubiquitous and invisible and hence perhaps uniquely suited to a discipline which is apparently unable to theorise its object correctly. Power becomes a quality which you either have or have not, an enabling facility which, necessarily, implies a series of instrumentalities to which it may be applied, for example, law, state, police etc. Over and against this, I have argued that law and state cannot be conceived of as 'instrumentalities' and that, used in this way, the concept of power is both unnecessary and ultimately meaningless. Accordingly, an analysis of organisational crime can proceed through a discussion of social relations, forms of organisation and so forth, without reference to the transcendental ramifications of the concept 'power' and the consequent heralding of asymmetrical power relations as an explanation of, for example, 'ambiguity'.

'Power' implies an agency, its source normally being supplied by various forms of state, which either gives form to inchoate 'power' or which constitutes the nub of that power, constructing the powerful through the existence of a privileged relationship with state: the 'powerful' are those who have access to state 'power'. The state, therefore, is an important lynchpin which can condense competing claims, focus class conflict by presenting itself as the object of struggle, or else articulate the various instances of the 'totality' according to some ultimate determinative principle.<sup>(38)</sup> In conceiving of the state in these specific, albeit discrete, ways it is implicitly assumed that the state acts toward the general orchestration of society, as a means for imposing, constructing, or

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(38) See, for example, Cutler et al (1977 & 1978) 'Marx's Capital and Capitalism Today' I & II, London: R.K.P.

representing uniformity. The very concept of state as it applies to discrete operations necessarily implies a form of unity, even if it be a contradictory unity, otherwise the concept of state apparatus would have no meaning whatsoever. Thus social relations are assumed to be stamped throughout according to some determinative principle, some definitive condensation of class struggle or interests, or some material reflex of an ideal state. I will argue against this notion of uniformity; that, for example, law and state, necessarily, represent the 'interests' of 'capital' or the 'powerful' and that relatively autonomous components of social structure ultimately cohere with such interests or conditions. Against the notion that the fabric of society is woven around a principal design, whether the pattern is loosely sketched or rigidly marked.

After paying due respect to the particular, it is often assumed that the ultimate explanation of a phenomenon is to be found in the eventual convergence of social relations around a principle of 'capital' reproduction, the realisation of an ideal force, the definitive resolution of competing interests, or the 'totality'. In this respect the area of organisational crime is no exception, abounding as it is with 'absent' causes. The argument is really very simple; by itself the concept of state explains nothing and can add nothing. For radical criminology to act as if the simple introduction of the 'state' as an additional weapon in the criminological armoury immediately rectifies the failings of more traditional white collar criminology is the measure of its overwhelming failure to address organisational crime in any but a token manner.

The state is defined by Nicos Poulantzas as follows,  
"The state ... forms the contradictory locus of condensation for the

balance of forces that divides even the dominant class itself".<sup>(39)</sup>

Notwithstanding the commitment to a 'structuralist' architecture and given the problems involved in rendering a theory of political action within an essentially Althusserian concept of the 'totality', there is a sense in which Poulantzas is perhaps hinting at a more radical concept of state.<sup>(40)</sup> A conception which dissolves the state as an entity and as the realisation of an ideal force, so much is quite clear in his work, but, further, one which attempts to roll back the state to a point where it becomes nothing other than a site for the intersection of political (class) forces. Quite simply the state does not 'exist': it is merely a 'bourgeois' distraction which encourages social Democratic politics. This also provides a clue to the sustained dialogue between Poulantzas and Miliband and, in particular, the issue of whether the 'family' is part and parcel of a state apparatus.<sup>(41)</sup> It can be argued that the 'proper' focus is on forms of organisation, social relations, and what Paul Hirst would describe as political practices and criteria of decision making.<sup>(42)</sup> Far from halting analysis by describing an operation under the auspices of a state apparatus and

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(39) Poulantzas, N. (1975) op cit. p. 158/9.

(40) The concept of 'totality' will be described in more detail in Chapter two.

(41) See Poulantzas, N. (1976) 'The Capitalist State'. New Left Review, 95, Miliband, R. (1973) 'Poulantzas & the Capitalist State' NLR 82; and also Poulantzas, N. (1969) NLR. 58, & Miliband, R. (1970), NLR 59.

(42) Hirst, P. (1979) 'On Law & Ideology', London: Macmillan.



thereby implying a source of ultimate conformity, the state, this procedure has the merit of analysing concrete forms of political process rather than suspending analytical endeavor by the invocation, or even incantation, of state.

Again, the utilisation of the concept of 'power' often implies that it is the source of a fundamental cleavage between the powerful and the impotent. As such this implicit concept of class assumes that the 'powerful' are an elite unified by their conscious reflection that they are powerful and united in defense of that power and, consequently, in defense of the structure which sustains them in power. In the absence of an overt conspiracy the mere possession of 'power' is apparently sufficient to generate a congruence of interests and their subsequent transmission to organs of state. Power, therefore, structures the scenario, possibly under the direction of an absent 'economic' actor, through the mediation of powerful actors who, either implicitly or explicitly, support these underlying structures of 'power' and implement their requirements. Conscious conspiracy or structural congruence tend to exhaust the repertoires of 'power' available to criminology in its quest for an analysis of organisational crime and it is precisely this exhaustion which is characteristic of its relative failure.

Finally, the absent economic actor 'who' stalks the wings in anticipation is assumed to be a uniform, regular character, able in one way or another, to achieve the realisation of 'his' requirements. It will be quite clear that to talk in terms of a unified font of all 'power' - Capitalism, monopoly capital, big business, an ideal spiritual force, or an international Jewish conspiracy - is to devalue the very real struggles and conflicts which shape 'law' and state. Workers against the monolith becomes a slogan which effectively cripples all political action and all forms of concrete analysis.

I have argued that each of these concepts - state, power, capital, class and totality - is gripped by inherent contradictions which raise severe problems for sociological analysis. That criminology tends to 'use' these concepts at random, especially since they are at best only equivocal conceptual explanations, is the primary obstacle to a proper analysis of 'organisational crime'. More specifically I have argued that the problems with 'crimes of the powerful' are instances of the inherent limitation of a criminological approach to 'organisational crime' and thus are not specific to a particular text, but refer centrally to a particular enterprise. These problems denote the limits to a Marxist Criminology and in particular the problems attendant upon a conjunction of criminology and Marxism. As an alternative I would venture to suggest that the problems of the legal regulation of corporations are more complex in that they cannot be reduced to the capitulation of law enforcement agencies and the genuflection of state in the face of almighty corporate 'power'. One thing 'white collar' criminology does not seem to consider in any great detail is the possibility that corporate activity cannot be regulated by classifying it as real crime and utilising the machinery of law, that criminalisation may not be a viable means of controlling corporate crime.<sup>(43)</sup> It is this possibility which the thesis seeks to take up and explore.

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(43) It is quite true that Cressey hints at such an outcome arguing that the criminal law cannot effectively be used to attack organisations although his solution - the creation of an offence of 'organised crime' and his explanation; that corruption causes organised crime - tend to thwart any radical potential and belie the original promise. See Cressey, D. (1972) 'Criminal Organisation', New York: Heinemann, p. 82.

## CHAPTER II

### LAW, ECONOMY AND SOCIOLOGY.

The idea that law and economy exhibit a general interrelationship is perhaps a commonplace. Whether it is the relatively simple assertion that company law provides the framework for capital organisation or the somewhat stronger claim that legal relations reflect economic reality, the idea that law and economy are related in some way remains paramount. Consequently, the only task would seem to be to establish specific points of convergence. Indeed this is the standard brief of much 'socio-legal' research. Against this, however, it is arguable that the very idea of a relationship between law and economy entails a particular conception of the nature of the 'legal' and the 'economic' as separate orders. This sort of conception is both inadequate, as far as it goes, and, moreover, heralds a portrait of the social formation which is at best unacceptable and at worst plagued with contradictions. I would question, therefore, both the manner in which the issue of the law/economy relation is traditionally posed together with the very idea of a relation between separate instances of the social formation.

To this end the present chapter is concerned to outline the terms in which the law/economy relation is conventionally established; to demonstrate the concepts generated in pursuit of a law/economy relationship and to argue the particular consequences of these respective positions. The critical thrust of these remarks is sustained in turn by a demonstration of the pertinent features of what is, arguably, a more appropriate analysis of 'legal' and 'economic' relations. This alternative formulation emerges more clearly in the context of an examination of corporate relations of production, private property and forms of ownership undertaken in subsequent chapters. The demonstration of this alternative, however, is essential for the proper conceptualisation of the historical relevance and effectivity of anti-trust legislation



together with the proper assessment of the more contemporary influence of 'legal' controls on corporate forms of business activity. For example, it will be argued that the very separation of 'law' from 'economy', achieved via the constitutional doctrine of the separation of powers, is directly responsible for the limited impact of anti-trust legislation.

What then is wrong with the conventional portrait of the law/economy relationship? The problem is easily stated. In order to describe a relationship between the structure of legal relations, on the one hand, and the relations or forces of production, on the other, it is necessary to effect what Cutler et al would call a prior distribution of social space into 'economic' and 'legal' realms.<sup>(1)</sup> It is arguable that not only is this distinction untenable in itself but also that it generates a series of quite specific problems which will be set out in due course. In apparent disregard of these twin problems the particular distribution of social space in mind constitutes the under-acknowledged starting point for the perspectives described below. More importantly perhaps, this division of social space appears to operate as a 'given' beyond analysis which is unavailable for examination by the positions which, nevertheless, claim it. Therefore, the prior distribution of social space into distinct 'legal' and 'economic' instances, first of all, is not normally justified by the perspectives which rely upon it and, secondly, constitutes an obstacle to the proper assessment of legal/social relations. Accordingly, the refusal to either remove or justify the prior separation of legal and economic

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(1) Cutler, A. et al; (1977) 'Marx's capital and capitalism Today' London: R.K.P. p. 135.

instances means that the conditions of the relation, together with the status of that which is related, cannot be adequately assessed.

In general the analysis of the relation between law and economy takes one of two forms. Either, law is seen as absolutely autonomous of economic affairs with the result that law is viewed solely as a logico-deductive system which is both consistent and self sufficient, evolving on the basis of the self realisation of an eternal, legal, essence. For example, legal positivism and logical normativism achieve just such a cleavage between law and economy. Or else law is reduced to the economy in one of two ways. First of all, in terms of law's functionality or co-optability for the 'economic substratum' which leaves law as a positive, although empty, framework, which is then subject to various purposes or uses through time. For example, it will be argued that the work of Karl Renner evinces this general tendency as do certain of the propositions within the work of Max Weber.<sup>(2)</sup> This particular perspective displays a basic instrumentalism with regard to the external relationship established between law and economy. In effect the 'law' is there to be used at will by successive economic substrata irrespective of the relations constitutive of each. Secondly, on the basis of the parallel development of juridic and economic thought, Pashukanis argues that juridic categories are reflections of objective social relationships and that the 'form' of law is basically the 'form' of commodity exchange.<sup>(3)</sup> For Pashukanis, the form of law thus expresses the

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(2) See Renner, K. (1949). 'The Institutions of Private Law and their Social Functions'. London: R.K.P. and Weber, M. (1968) Economy & Society, New York: Bedminster.

(3) Pashukanis, E. (1978). 'Law and Marxism'. London: Ink Links.

form of commodity exchange or production by virtue of an essential parallelism between the analysis of law and the analysis of value. The reduction of law to economy is accomplished in both cases; for Renner, through a form of instrumentalism and, for Pashukanis, through a sophisticated, albeit ultimately more compelling, variety of Economism.

A rather different, although linked, procedure can be seen in the work of Althusser, Balibar and Poulantzas.<sup>(4)</sup> This is not meant to suggest that all three can be reduced to a common or essential problematic, indeed there are quite substantial differences between them, but merely to point out some of the similarities in their respective treatment of the law/economy relation. Althusser, and to a certain extent Poulantzas, do not directly analyse the relationship between law and economy but instead, along with Balibar, assign each their respective locations within the 'totality'. The conditions of the combination or, more generally, the relation which holds between law and economy, therefore, is reduced to an effect of the specific combination of the invariant elements of production. In the last instance this sort of position can, with some justification, be described as a more elaborate version of 'economism'. For example, this perspective quite clearly depends upon a definite conception of the 'totality' as an expressive force which underlies and ensures the ultimate coherence of relatively autonomous (regional) instances.

The distribution of social space into an economic and a distinctly legal realm, so vehemently affirmed in the positivist insistence on

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(4) See Althusser, L. and Balibar, E. (1970). 'Reading Capital' London: N.L.B. and Poulantzas, N. (1973) op cit.

abstracting the logical structure of legal systems as a separate object of analysis, is shared also by 'economistic' and 'instrumentalist' positions on law and economy. Therefore, the prior separation of 'law' and 'non-law' and law from economy are effectively parallel positions. This follows for the simple reason that the two cannot be distinguished by this criterion alone. This particular distribution of social space is found again in the work of Cutler et al who also manage to achieve a somewhat similar separation between, in this case, the relations of production and the provision of their (legal) conditions of existence.<sup>(5)</sup>

These then are the general parameters of the law/economy relation. It is necessary, however, to provide a more detailed description of each perspective. Whilst paying due regard to the specific problems encountered by each respective position the critique will be sustained by the argument that these specific problems are but instances of a more basic fault. This fault, it will be argued, is the prior separation of law and economy as distinct orders of sociality.

The choice of specific advocates of the law/economy relation is evidently selective in as much as there is a pre-ponderance of avowedly Marxist accounts. Whilst this may be viewed in terms of overrepresentation it can be justified on the grounds that, by and large, it has been 'marxist' accounts which have addressed the issue with more sustained attention than any other. Where the influence of Marx is not readily discernable it stems, nevertheless, from an

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(5) Cutler, A. et al (1977) op cit.



implicit dialogue or from confronting the issue of the economic and the non-economic (Parsons) or the relation of law and capitalism (Weber).<sup>(6)</sup> With certain reservations these rather different perspectives effectively re-inforce the argument set out below.

Pashukanis:

For Pashukanis 'the primary basis of law is rooted in commodity relations' both in that the form of law and the form of value share a common conceptual structure and in the sense that law is necessary for commodity production that is, it is seen as a condition of existence of exchange. As C.J. Arthur notes, "For production to be carried on as production of commodities, suitable ways of conceiving social relations and the relations of men to their products have to be found and are found in the form of law".<sup>(7)</sup> The suitability of law for this particular function lies in the supposed centrality of the concept of equivalence in law. That is to say the ideal that all men exist as private and abstract social beings endowed with the capacity to have and acquire equal rights and equal obligations is fundamental to the law. As Pashukanis notes "every sort of juridic relationship is a relationship between subjects. A subject is the atom of juridic theory: the simplest element, incapable of being resolved further".<sup>(8)</sup> In short, in order for commodities to exchange

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(6) See Parsons, T. & Smelser, N. (1956), 'Economy and Society', London: R.K.P. and Weber, M. (1968) op cit.

(7) Arthur, C. 'Towards a Materialist Theory of Law', Critique 7 (1976/77) p. 35.

(8) Pashukanis, E. (1951). 'General Theory of Law and Marxism' in Babb, H.W. and J.N. Hazard (ed.) (1968) *Soviet Legal Philosophy*, Harvard: Johnson Reprint Corp. p. 160.

it is necessary that agents 'don the mask of owners' and enter into relation with other 'owners' and other commodities.

The conceptual parallel between the derivation of value in Marx's Capital and the derivation of the form of law (the category of the 'subject of rights' is an abstraction from acts of exchange in the market) is supplemented by the 'necessity' of law as a condition of existence of commodity production in general and as a condition of existence of capitalist relations of production in particular. It is not clear, then, whether law stands in a relation of expression to relations of production, in which case formal juridical relations of property are considered as economic relations. For example, Pashu Kanis asks the question "where shall we search for the unique social relationship whose inevitable reflection is the form of law?"<sup>(9)</sup> and states that the required relationship is that of the possessors of commodities. Although elsewhere he remarks that, a juridic relationship between subjects is merely the other side of the relationship between the products of labour which have become goods (commodities)!<sup>(10)</sup> Furthermore, Pashu Kanis makes the point that property relationships, " .. are the very same relationships of production expressed in juridic language".<sup>(11)</sup> The essential economism entailed in seeing property relationships as relations of production has been noted by Poulantzas when he points out that, "... this renders the cardinal distinction between real appropriation

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(9) ibid p. 138.

(10) ibid p. 140.

(11) ibid p. 145, (emphasis added).

(that is, economic property) and formal juridical property .....  
theoretically impossible".<sup>(12)</sup>

The inability to draw this distinction between economic and juridic ownership results in very real difficulties when Pashu\_Kanis attempts to theorise the corporate enterprise in terms of a 'lapse' of private property and the partial suppression of commodity exchange between formerly separate units of the corporate enterprise. Moreover, if law is a condition of existence of relations of production then such a radical separation subverts the essential 'equivalence' between commodity and legal relations established above. To be sure Pashu\_Kanis is ambiguous on this point, at one stage he consistently denies that law can function as a condition of existence of relations of production. For example, he states that law can assure or guarantee relations of production or exchange but it cannot generate such relations and that in the absence of relations of commodity production the corresponding juridic relationship is inconceivable. At another point Pashu\_Kanis argues that the existence of man as a subject of rights is a condition of exchange according to the law of value and consequently views law as a condition of existence of relations of exchange.

The dual determination of law, once by its function and once by its reflexive expression of commodity relations, perhaps points up another more basic weakness within the work of Pashu\_Kanis. That is to say the two components of Pashu\_Kanis' analysis of law, the form of law as the form of commodity production and law as a condition of existence of commodity production, are contradictory,

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(12) Poulantzas, N. (1973), p. 72n. 20. See also P.Q. Hirst (1979) op cit for a more recent reiteration of this sort of criticism.

and, as a result of their combination, inherently unstable. If law does reduce to commodity production, through the nominal equivalence of their respective forms, then commodity production establishes its own conditions of existence through the dominance of its 'form'. As a consequence law cannot at the same time be a condition of existence of commodity production since the form of commodity production is a condition of existence of (bourgeois) law. If the concept of conditions of existence is rejected then the economism of the residue is evident.<sup>(13)</sup> Otherwise Pashukanis must posit an immutable essence underlying the variability of all phenomena; a position which underlines the incipient idealism of Pashukanis' work. Finally, for legal relations to be seen as economic relations, and for property relations to be seen as relations of production expressed in juridic language, there must be a prior specification or assumption of two separate instances - law and economy. This must follow if one instance can be expressed in the language of the other and if one can be seen as the other. A prior separation exists both ways. Moreover, for Pashukanis, to cite the equivalence of method as between the derivation of value and the derivation of law is to imply that political economy, for example, is applied to distinct domains and, therefore, to distinct instances, Law and Economy. If, on the other hand, law is seen as a condition of existence then the separation between law and economy is evident yet again, as are the consequences attendant upon that separation.

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(13) For example P.Q. Hirst makes the point that "Possessive right, the essence of the legal form, is a derivative of commodity relations between economic subjects. One reductionism, of law to class oppression, is rejected in the interests of another, of legal form to commodity form".  
Hirst P. (1979), 'On Law and Ideology' London: Macmillan p. 110.



Poulantzas:

For Poulantzas, "The relation, between legal contract and exchange is a relation of structures" and the limits of intervention of one regional structure on the other are ultimately set by the conditions under which the direct producer is separated from the means of production.<sup>(14)</sup> The relation, then, is not based on any measure of 'equivalence' between contract and exchange, nor is legal contract an 'expression', or a condition of existence, of an 'economic' relation. Instead the separation of the direct producer from the means of production has two series of effects:-

- (1) at the economic level this separation results in the concentration of capital and the socialisation of the labour process;
- (2) at the juridico-political level this separation, "sets up agents of production ... as political and juridical 'individuals-subjects', deprived of their economic determination".<sup>(15)</sup>

The relation between the economic and the juridico-political level is not an expressive relationship, but depends instead upon the specific combination of invariant elements of production in a determinate mode of production, and upon the particular social formation under consideration. The juridico-political level comprises two distinct realities and two relatively autonomous levels - the juridical structures (law) and the political structures (the state).<sup>(16)</sup>

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(14) Poulantzas, N. (1973) 'Political Power & Social Classes. London: N.L.B. p. 89.

(15) ibid p. 128.

(16) ibid p. 42 n.8

This subdivision of the juridico-political level does not alter the relationship of effectivity between the relations of production and law, although it does pose a relative dislocation between law and state, each conceived as separate, though related, instances of the social formation.

Although the juridical structure is determined, in the last instance, by the structure of the labour process the juridical structure has reciprocal effects on the (economic) class struggle. This primary effect of the juridical structure consists precisely in concealing the fact that the relations between agents of production are specifically class relations. As Poulantzas notes, "This means that agents of production actually appear as 'individuals' only in those superstructural relations which are juridical relations. It is on these juridical relations, and not on relations of production in the strict sense, that the labour contract and the formal ownership of the means of production depend".<sup>(17)</sup> The implications of this are clear; individuals are not constituted as subjects for the relations of (commodity) production nor is the 'individual-subject' the unique expression of the form of (commodity) production. Poulantzas is quite clear on this; agents of production only exist as 'individuals-subjects' in the field of juridical relations at the level of juridical structure, agents of production do not exist as individuals-subjects in the production process. This 'isolation' of individuals-subjects has an effect on socio-economic relations; namely, it results in the .."ideological conception of the capitalist relations of production which conceives them as commercial encounters

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(17) Poulantzas, N. (1973) op cit, p. 128 emphasis added.

between individuals/agents of production on the market".<sup>(18)</sup> In a word it results in the (ideological) concept of (free) competition. The effect of the juridical structure is restricted to the field of socio-economic relations and therefore, it does not alter the structure of the capitalist relations of production. In the 'juridic sense', private property belongs to the level of juridical relations; its effect is that of an ideological concept which has no substantive basis in the relations of production but is designed to conceal these by representing them to agents of production as relations between individuals-subjects. The ultimate convergence of law and economy is not secured by any simple correspondence or expression but is orchestrated by the requirements of the totality. Poulantzas, thus separates the juridic and economic levels and any relation between the two is consequently external, being secured by the mode of production in question. Determination in the last instance by the character of the labour process ensures the 'unity', albeit a contradictory one, of the economic and juridic instances conceived as levels within a totality ultimately 'structured' by the relation between the direct producer and the means of production which is ultimately dependent on the mode of possession of, or separation from, the means of production. Poulantzas, therefore, avoids rampant 'economism' and 'instrumentalism' although only at the expense of embracing a formal structural-functional architecture raised on the basis of structural causation and the implicit notion of an expressive totality. Thus, law instead of 'reflecting' economic reality or being a 'condition' of economic production is but an instance of the 'totality'. Furthermore, the fact that the totality of the social

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(18) ibid p. 130.

formation is ultimately structured according to a single determinative principle namely, the character of the labour process, means that 'legal' relations, necessarily, 'cohere' with 'economic' relations. The correspondence is an effect of the structure; it emanates from the totality.<sup>(19)</sup> Therefore, legal relations are assigned a particular function which, in the case of Poulantzas, reduces to the portrayal of an imaginary social order where commercial encounters are meetings between individual human subjects. Two very important consequences follow from this. First of all, law and economy are assigned distinct places within the social structure. Secondly, each is an effect of the structure (structural causation). The picture is complicated, further, by the ultimate determination of the whole by the economic. To be sure, this is no simple economism, but it does have the effect of drawing a purely arbitrary distinction between law and economy.

In his last book, *State, Power, Socialism*, Poulantzas attempts to jettison some of the more unacceptable implications of his earlier work. This reformulation starts by attempting to take seriously the profound interconnection of state and social relations. Or in other words, .. "the necessity of relating the state institutional structure to the capitalist relations of production and social division of labour".<sup>(20)</sup> Thus the state is both rooted in the field of social relations and at the same time has a vital role in their constitution and reproduction. This is not the entire story, however, for the state also exhibits a

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(19) For an elaboration of this argument see Cutler et al (1977) especially Chapter 8 and 9.

(20) Poulantzas, N. (1978). *State, Power, Socialism*, London, N.L.B. p. 123.



'peculiar material framework' irreducible to the structure of social relations but nonetheless co-extensive with them. The state, therefore, is poised rather precariously on the edge of the field of social relations of which the state is both member and alien, part and non-part. The picture is further compounded when the original definition of the state as the mere 'locus' for the condensation of a balance of forces is re-affirmed. All this is maintained within a general adherence to an implicit conception of the 'totality' and a vision of ideology as the cement of the social formation.

No doubt there are a number of telling ambiguities in what Stuart Hall, in his postscript to Poulantzas,<sup>(21)</sup> calls an 'unfinished' and 'unsettled' work. Nevertheless, there are certain observations on the nature of law which are richly suggestive. For example, Poulantzas demonstrates the inherence of law in the social order .. "Law is always present from the beginning in the social order: it does not arrive post festum to put order into a pre-existing state of nature. For as the codification of both prohibitions and positive injunctions law is a constitutive element of the politico-social field."<sup>(22)</sup> Likewise the fact that .. "the capitalist separation of state and economy was never anything other than the specifically capitalist form of the state's presence in the relations of production"<sup>(23)</sup> appears to allow for a rather different conception of the interconnectedness of state, and economy and, by implication, law. This allowance is

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(21) Hall, S. (1980) 'The Legacy of Nicos Poulantzas' New Left Review, 119.

(22) Poulantzas, N. (1978) op cit p. 83.

(23) ibid p. 167.

indeed taken up in what Poulantzas terms, "... the very delimitation of the respective spaces of the state and the economy".<sup>(24)</sup>

Furthermore, Poulantzas argues quite explicitly that the roots of the specific features of 'capitalist' law... "have to be sought in the social division of labour and the relations of production"<sup>(25)</sup>

which evidences a clear break with those who base the .."specificity of the capitalist juridical system in the sphere of circulation of capital and commodity-exchange".<sup>(26)</sup> Finally, Poulantzas does

indeed go some way toward specifying exactly how law is rooted in the relations of production: "The axiomatic system of capitalist law constitutes the framework wherein agents who are totally dispossessed of their means of production are given formal cohesion ... The

formal and abstract character of law is inextricably bound up with the real fracturing of the social body in the social division of labour - that is to say, with the individualisation of agents that takes place in the capitalist labour process".<sup>(27)</sup> Therefore, over and against

those who, like Pashukanis, seek to derive state and law from commodity-exchange and relations of circulation, Poulantzas tries instead to find law and state from within the relations of production. That this position is plagued with internal difficulties stems in the main from the retention of the concept of a 'totality' and the positioning of the state as the central organising instance which is at once historically determinate as well as representing nothing other than the essential moment of class struggle.

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(24) ibid p. 166.

(25) ibid p. 86.

(26) ibid p. 86.

(27) ibid p. 86.

## Balibar:

Balibar is interesting for two main reasons. First of all, he manifests the more general components of a more or less orthodox Althusserian position. Secondly, for the reason that within the general framework he presents a specific attempt to deal with law and in particular 'possession' based upon an interpretation of Marx which, if not altogether novel, is at least intriguing.

The starting point for Balibar and for that matter Althusser and Poulantzas, is the definition of a mode of production as a system of forms representing one state of the variation of a set of invariant elements. These elements are:-

- (1) The Labourer (Labour power).
- (2) The means of production (object of labour and means of labour).
- (3) The agent of appropriation of surplus labour.

These three elements are subject to two relations or connexions between them. The relations, or connexions, refer to the articulation of the three elements and not to the elements themselves.

The two relations or connexions are:-

- (a) The relation of real appropriation; 'the real material appropriation of the means of production by the producer in the labour process'; the appropriation of nature by man. For example, in the individual appropriation of natural objects the labourer controls himself'. This relation, then, is the connexion between the direct producer and the appropriate means of immediate production, between labour power and the relevant means of production. Balibar says of this relation "Nowhere does the Capitalist intervene as owner; only the

labourer, means of labour and the object of labour".<sup>(28)</sup>

(Althusser diverges slightly since he characterises this relation of real appropriation as the productive forces understood as relations rather than as things or 'technological imperatives'. Accordingly, despite the 'stalinist' overtones Althusser's position should not be confused with the idea that the dislocation between the forces and relations of production constitutes the 'motor' of history. Such a conception is generally induced by arguing the irrepressible expansionism of the forces of production which thus burst assunder the corresponding relations of production thereby calling for and in effect generating new relations of production).<sup>(29)</sup>

- (b) The relation of (Economic) property. This connexion .."describes one of the presuppositions of capitalist production: Capital is the owner of all the means of production and of labour, and therefore it is the owner of the entire product".<sup>(30)</sup>
- In a word the mode of appropriation of surplus labour and the form of its (social) distribution. (Again Althusser characterises this property relation as the 'relations of production

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(28) Althusser, L. & Balibar, E. (1970) 'Reading Capital' London: N.L.B. p. 213.

(29) For a forcefull criticism of this conception of 'production' and 'social' relations see Hindess, B. and Hirst, P. (1975) 'Pre-Capitalist Modes of Production', London: R.K.P and 'Mode of Production and Social Formation' London: Macmillan (1977). Also for a defence of Balibar's contribution in particular see Cohen, G. (1979) 'Karl Marx's Theory of History: A Defence', Oxford: O.U.P., which argues for the necessary separation of forces and relations of production.

(30) Balibar, E. (1970) op cit p. 213.



For Balibar, this "... property relation is itself specified according to several complex forms, notably the duality of 'possession' (use, enjoyment) and 'property' (property strictly speaking)".<sup>(31)</sup> Accordingly, the juridic concept of property does not enter at all as a connexion between the invariant elements but is instead specified by the juridic instance, the ultimate foundation of which is located within the specific manner in which these two connexions 'combine' the elements of production. Strictly speaking then, juridic property belongs to, or rather is a level within, the superstructure. Its role appears to be the 'ideological' interpretation, specification or expression of the 'property relation' and, therefore, it does not intervene either directly between the elements or as a relation of those elements to each other. Therefore, the division between Economic and Juridic structures is effected as a division between material reality (Economic) and ideology (law). It is the homology or non-homology of the two relations - real appropriation and the property relation - which determines the essential meaning of the phrase - determination of a mode of production by the economic in the last instance. In the last instance the combination of forces and relations of production, or the relation between the two connexions, ultimately determines each level, including the juridic, within a mode of production.

This, broadly speaking and with certain minor modifications is the position shared by Balibar, Althusser and Poulantzas. Balibar, however, has developed the relation between law and economy considerably further than the other two. Whilst he never escapes the problems of an ultimate economism and the prior separation of law and economy

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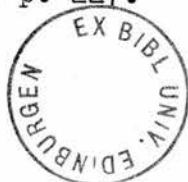
(31) ibid p. 213.

as instances he does at least offer a framework which enables a proper theorisation of the divorce between ownership and control. Although in the end it can be argued that the tensions introduced by two or more competing conceptions of the law/economy relation are inescapable and ultimately degenerate into serious contradictions. Nevertheless, it is important to examine Balibar's work mainly for the way in which he poses the problem and/or the issues raised as a result of posing the problem in that particular way.

The starting point for an analysis of the relationship between the labour process and the legal structure, for Balibar, is the prior "... question of distinguishing sharply between the connexion that we have called 'property' and the law of property".<sup>(32)</sup> In other words 'property' logically precedes the law of property and therefore, cannot be dependent on the law of property for its existence. On this basis law cannot be a condition of existence of the property relation and consequently cannot function as a condition of existence of relations of production. It is necessary for Balibar to draw this distinction, between property and the law of property, in order for him to theorise the relationship between the economic and juridic instances as the articulation of regional structures each with their own relative autonomy. This follows because it is the relation between the property connexion and the relation of real appropriation which defines the determinism of the 'economic' in the last instance. Property, therefore, is a determinant of juridic property. Balibar is quite insistent that the concept of 'articulation' used here precludes the simple duplication of one regional structure by another. Thus the relation between law and

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(32) Balibar, E. (1970) op cit. p. 227.



economy is not one of duplication but of the articulation of two heterogeneous instances. For example, Balibar makes the point that the "... very concept of expression is difficult .... once it no longer means duplication but rather the articulation of two heterogeneous instances".<sup>(33)</sup> Moreover, "... since contradictions are induced within the law itself by its non-correspondence with the relations of production, law must be distinct and second in order of analysis to the relations of production".<sup>(34)</sup> Several points are clearly established in this and in following passages. They are as follows:- First of all, Law is part of, or belongs, to the superstructure,-not in the crude sense of being a mirror image or duplicate of the economic base -but as a regional instance replete with its own relative autonomy. It has often been argued that relative autonomy is an inadequate concept with which to grasp the law/economy relation and that the concept of relative autonomy contains an inherent reductionism in that it slides inexorably into economism. For example, Hindess & Hirst, argue that in the absence of any attempt to specify the conditions and the mechanisms of relative autonomy this conclusion is unavoidable.<sup>(35)</sup> Further, relative autonomy requires a guiding instance which is capable of ensuring that autonomous levels are only relatively autonomous. That is to say, something is required which will produce some sort of overall coherence. Secondly, Law is secondary to relations of

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(33) Balibar, E. (1970) op cit. p. 229.

(34) Balibar, E. (1970) op cit. p. 228.

(35) See in particular Hindess, B. (1978) 'Classes and Politics in Marxist Theory' in 'Power and the State' (ed). Littlejohn, G. et al, London: Croom Helm. (pp. 72 - 98) and Hirst, P. (1977) 'Economic Classes and Politics' in 'Class & Class Structure' (ed). Hunt, A. London, L.P.W. (pp. 125 - 155).



production and, therefore, can be theorised on the basis of its non-correspondence with the relations of production. There are obvious conceptual parallels between the Stalinist and technicist conceptions of the economic focus in terms of their correspondence or non-correspondence with relations of production. For this 'technicist' position Law is effectively exhausted by the question of its correspondence or non-correspondence with the 'economic'. No other relation is conceivable between these two (separate) levels - either law is an adequate expression or duplicate of the economy or it is not. If law does not correspond then it is because the economy has transformed itself and will eventually manage to secure a new correspondence in law.

Thirdly, it is quite clear that neither law's functionality nor its analytic subservience to relations of production can guarantee the generation of law. For example, Balibar argues that, "What we can see from the reproduction of economic relations is the necessary function of the law with respect to the system of economic relations itself, and the structural conditions to which it is therefore subordinate; but not the generation of the instance of the law itself in the social formation".<sup>(36)</sup> Thus Balibar does not assume that because law may be functional for production relations that this, necessarily, explains its genesis. Balibar's precise meaning is demonstrated by the fact that he reserves, or restricts, the functionality of law to the re-production of economic relations thereby excluding law from holding as a prior condition of those relations as such.<sup>(37)</sup>

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(36) Balibar, E. (1970) op cit. p. 229. As we shall see there are certain parallels to be drawn between this particular point and the work of Cutler et al (1977) who argue a substantially similar position.

(37) See, for example, Hadden, T. (1977), *Company Law & Capitalism* London: Weidenfeld & Nicolson. He argues that a de facto form of Joint Stock Enterprise existed prior to the relevant 'enabling' codes of Company Law. Thus the legal form of the Joint Stock Enterprise was only of use in the reproduction of 'corporate' Capitalism.



Nevertheless, this does not prevent Balibar from arguing at the same time that "... the whole of the economic structure of the capitalist mode of production from the immediate process of production to circulation and the distribution of the social product, presupposes the existence of a legal system; the basic elements of which are the law of property and the law of contract".<sup>(38)</sup> The legal system apparently functions as a condition of existence of the capitalist mode of production. It is difficult to envisage, however, quite how the formulation of the mode of production as a coherent totality structured in the last resort by the combination of the property connexion and the relation of real appropriation can avoid becoming any more than tautological with regard to the reproduction of the relations of production.

Quite simply Law, as a level within the mode of production, is by definition a pre-condition of reproduction. Insofar as law is construed as a condition of existence of relations of production and consequently of the mode of production then law is external to the mode of production as well as being a level within the mode of production. Moreover, law is effectively a condition of itself - self determined and self secure. There is of course a solution to this evident contradiction but it is a solution which is entirely circular namely the capitalist mode of production contains an economic and a legal structure each level, as members of the same mode of production, presupposes the other. Therefore, the concept of a 'totality', again ensures the coincidence and ultimate coherence of the dual determinants of law.

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(38) Balibar, E. (1970) op cit. p. 230.

Fourthly, Balibar points out that the peculiarity of the (capitalist) legal system "... is its abstract universalistic character: by which .... this <sup>s</sup>ystem simply distributes the concrete beings which can support its functions into two categories within each of which there is no pertinent distinction from the legal point of view: the category of human persons and the category of things. The property relation is established exclusively between human persons and things (or between what are reputed to be persons and what are reputed to be things); the contract relation is established exclusively between persons".<sup>(39)</sup> Furthermore, Balibar goes on to argue that .. "this universality of the legal system reflects, in the strict sense, another universality which is part of the economic structure: the universality of commodity exchange".<sup>(40)</sup> Accordingly, the necessary presence of universal categories (for example 'commodity') ensures the correspondence of law and economy. There are evident similarities between this sort of perspective and that of Pashukanis. But Balibar himself voices doubts over the very concept of expression. For example, he argues that the Hegelian concept of Civil society "... includes both the economic system of the division of labour and exchange, and the sphere of private law. There is, therefore, an immediate identity of appropriation in the 'economic' sense and legal property, and, in consequence, if the second can be designated as an 'expression' of the first, it is a necessarily adequate expression or duplication".<sup>(41)</sup> As we have seen already for Balibar these two aspects are sharply distinct which would seem to rule out any concept of duplication or correspondence.

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(39) Balibar, E. (1970) op cit. p. 230.

(40) ibid p. 230.

(41) Balibar, E. (1970) op cit. p. 227.

Finally, "whereas the 'law of property' is characterised as universalistic, introducing no differences between the things possessed and their uses, the only property which is significant from the point of view of the structure of the production process is the ownership of the means of production".<sup>(42)</sup> A dislocation obtains between the law of property and economic ownership or the distribution of the means of production. The law of property can then be seen as a generalised extension of the ownership of the means of production. Similarly, the labour contract is an extension of wage labour, an extension of a social relation of production. Contract and property are two separate forms in law but they define a single connexion within the economic structure ... "the ownership of the means of production and productive wage labour define a single connexion, a single relation of production".<sup>(43)</sup> A similar conclusion is reached by Renner who argues that one economic process corresponds to a whole group of legal categories - although the substitution of 'process' for 'relations' and 'categories' for 'forms' betrays a far greater distance between the two than is first assumed. The important point is that both view law as a separate level - either as a collection of forms effectively exhausted by two fundamental categories (Balibar) or as a collection of categories. Where they differ is that Balibar sees in these forms the generalised extension

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(42) Balibar, E. (1970) op cit. p. 231.

(43) ibid p. 232. See also Kinsey, R. 'Despotism and Legality' in 'Capitalism and the Rule of Law' (ed). Fine, B. et al (1979) London: Hutchinson. Kinsey appears to argue, amongst other things, that the organisation and control of production reaches its highest expression in the despotism of legality.

of a relation of production, an ideological specification or derivation, whereas Renner sees legal categories in their functional subservience to one economic process. Whilst the elements - economic and juridic instances - are substantially similar the relation between them, together with the specific determinants of each - legal logic or labour process -, are substantially dissimilar. Nevertheless, the concept of law as a generalised extension of relations of production cannot adequately grasp the law/economy connection. At most the concept simply resonates the general economic determinism of the last instance. It most assuredly does not develop any new relation between the legal and economic instances although it does supply a variation in the imagery.

Taken as a whole there is a distinct difference in Balibar's work between the analysis of the legal system, or the legal structure, as a 'functional' level within the capitalist mode of production and the concrete analysis of the relationship between property and the law of property. As a functional level law is structured by the mode of production which is in turn determined by the labour process; a kind of remote or mediated economism. Quite clearly, this position is rendered ambiguous if serious attention is paid to the additional specification of law as a condition of existence of relations of production. The central importance of law as a level within the mode of production provides the main thrust in Balibar's work on the general location of law with respect to economy. Insofar as he makes the relation between the labour process and the law of property the focus of his work, however, then the connexion between law and economy is far more complex since the relation is founded internally within the relations of production. This connexion does seem to replicate the economist overtones of Pashukanis but, at the same time, it generates a whole series of internal dislocations between



possession, on the one side, and the law of property, on the other. As a result a tension is induced between law as an ideological or functional level within the mode of production and the foundation of law in the relations of production that is, law is considered only in relation to its position within the social relations of production. In this sense juridical property is but one moment in the possession of /separation from the means of production - it is not a separate level merely a distinct kind of relation of possession of /separation from the means of production.

In his later work on the dictatorship of the proletariat Balibar poses the problem of law and economy in somewhat sharper terms.<sup>(44)</sup> Balibar suggests that a consistent anti-instrumentalism requires that law cannot be the basis of the dictatorship of the bourgeoisie. Law cannot be its own source nor can it be locked in mutual relation, and hence circularity, with democracy - democracy guarantees law which in turn guarantees democracy. In short, law must either reduce to class power, or the mode of production, or else it ends up confirming the bourgeois fiction that law is the law namely, law is its own source subject to no conditions of existence. In this he seems to forget the more sensitive outline of the relation between property and the law of property developed in his earlier work and remembers the dominant conception of law as an instance of the mode of production. The consequences of a full blown extension of what remains only a suggestion in Balibar's work will be examined later. Suffice it to say that in this suggestion one finds both the differences between Balibar and the earlier work of Poulantzas and a more productive aspect of the law/economy relation.

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(44) Balibar, E. (1976) 'On the Dictatorship of the Proletariat' London: NLB.

To summarise, Balibar argues that law primarily belongs to the superstructure. Therefore, he is at one with Poulantzas and Althusser since they each state that law and economy are two separate instances ultimately structured in their relative autonomy by the nature of the labour process specific to a determinate mode of production. This general thrust can be neither denied nor ignored. Although contained within this general thrust, or perhaps in spite of it, there are a number of more complex sensitive, and contradictory indications on law and economy. But in the last resort, these indications vanish in the wake of the reassertion of the dominant position on law as an instance of a determinate mode of production. Balibar's subsequent work confirms the hegemonic thrust of such a position.

Renner:

Karl Renner is concerned primarily with the impact of economic forces and social changes on the functions of the legal institutions of private law.<sup>(45)</sup> A prior separation, therefore, obtains between the economic and social realms on one side and legal institutions on the other. Any relation is theorised in functional terms on the basis of a functional correspondence or non-correspondence between the economic substratum and the legal system. The fundamental problem is posed in terms of the adaptation of relatively immutable legal frameworks to successive (economic) relations of production - pre-capitalist, capitalist and post capitalist or corporatist relations of production. The central theme is that law as such is static and only its functions change. Renner embraces both

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(45) Renner, K. (1949) 'The Institutions of Private Law & their Social Functions', London: R.K.P.

instrumentalism and (legal) positivism and he does so on the fundamental premise that law, as law, is quite separate and self contained, it provides its own conditions of existence. Law is its own source. To be sure Renner does attempt to introduce a dialectic between function and law although this attempt is evidently contradictory given the starting point and the instrumentalist and positivist problematic in which he is situated.

Renner's main concern is with the functional development of private property as the legal framework of capitalist relations of production. Since law is indifferent to its function and since law is effectively its own source, Renner does not so much produce a sociology of law as an analysis of the social functions of law. Law, as the law, is sufficient unto itself and, therefore, does not constitute an object of sociology. As a positive system law is given and only its functionality constitutes a legitimate object of analysis with the result that the determinants, or the conditions of existence, of law are outside the scope of Renner's analysis.

The cornerstone of Renner's work is his analysis of property. This analysis hinges upon two further concepts; juridic individualism and economic function. Whereas juridic individualism characterises the law of property economic function refers to the power of command over large aggregates of labour power which defines its social utility. In a word, Renner distinguishes between the social or collective function of law and its individualistic form. Notwithstanding the general separation of legal and economic orders, Renner appears to assume that the law of property and property are co-extensive. This apparent failure to register the internal dislocation within property, between its so called 'juridic' and 'economic' aspects, stems from Renner's insistence that 'property' is unified by its legal essence on one side and that its functions

are reified on the other. Property and the law of property are seen as identical and in their identity they are counterposed to its social utility. Accordingly, Renner is unable to see the relative 'dissolution' of the 'property' form as directly bound up with the predominance of the corporate organisation of relations of production. Instead, on one side, he sees the corporate economy and, on the other, private individualistic law. It follows from this actual co-existence that a functional relation holds between the two. Renner is thereby restricted to analysing the conditions of that functional relation seeing the development of legal institutions as the locus of that functionality. For Renner, the development of the complementary 'institutions' of contract, loan and lease ensures that the relation between the law of property, which is static, and the relations of production, which are variable, is in fact functional. The re-activation or re-ordering of legal institutions in accordance with specifically 'capitalist' property relations constitutes the mechanism whereby the untransformed norm is functionally transformed. The conditions of this re-ordering are not theorised by Renner and can only be explained through a relation of functional necessity. Since he concerns himself with positive law only to the extent that it 'generates' institutions which are open to 'scientific' observation and analysis then Renner can, with justification, be located within the confines of another positivism, that is positivism as understood in sociology. This sort of analysis has the somewhat dubious merit of appearing to genuflect before the altar of legal absolutism at the same time as it denotes a residue of concrete institutions amenable to empirical analysis.

Essentially, Renner, overemphasises the importance of juridic



property for economic property with the result that he concludes that in the end only individuals can work, command and possess things. This represents the direct extension of juridic categories to economic relations with the result that relations of production are seen exclusively as relations between persons and things. Consequently any analysis of the relations of corporate organisation in their own right is denied to Renner. As Balibar notes, from the standpoint of production it is the ownership or distribution of the means of production which is important, not the juridic form of private individualistic property relations. For Balibar the juridic form provides the ideological 'wrapper' of relations of production but not their conditions of existence. The fact that 'possession' and 'economic ownership' of the means of production can be lodged at respective levels of the corporate structure, thereby registering the separation of the components of private property from each other, indicates that the 'form' of individualistic property in the juridic sense, is irrelevant from the standpoint of production. Furthermore, Gurvitch makes the point that Renner fails to take notice of the existence of deeper levels of law which vary in 'direct and immediate functional relation with the totality of social life' and that the transformation of the structures of jural institutions can occur independently and in opposition to abstract propositions of law. Such criticism is to some extent misplaced since this is perhaps Renner's point. Whilst it remains true that Renner draws the distinction between law and function externally and that Gurvitch sees the distinction as an internal expression of frameworks, systems and kinds of law each corresponding to, and being formed by, respectively - collective groups, inclusive societies, and forms of sociality - at bottom they are almost saying the same thing only using competing concepts and different lines of demarcation between law

and non-law that is based on diverse levels of abstraction or generalisation.<sup>(46)</sup>

Renner, therefore, effects a prior separation between law and economy, sees law in an instrumentalist sense as something to be used by the economic relations of production, and views the conditions of that utility as framed by the necessary functionality of law for production. All this takes place within a positivist insistence on the role of institutions and a positivist insistence on the origin and the self sufficiency of Law as a system. In concrete terms he is unable to distinguish between 'property' and the law of property and his analysis of the corporation is inadequate by virtue of the failure to view the corporation as a distinct organisational form. This last point derives from the over extension of the legal categories - person and thing - to relations of production. Thus legal categories remain intact and the relations of production are distended in order to enter a functional correspondence between law and economy. This particular portrait of law is extremely important when it comes to assessing the form and impact of anti-trust legislation since it imputes a basic capability to law. It will be argued that any such capacity is fundamentally mistaken.

Cutler, Hindess, Hirst and Hussain:

An underlying continuity with Renner can be traced in the work of Cutler, Hindess, Hirst and Hussain. Law, for Renner, does not cause economic development although it may nonetheless be a condition of it. For example, law makes the transformation of property into capital possible but it is not itself the agency of transformation. The cause is external to law. Likewise law confers the power to act

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(46) Gurvitch, G. (1947) 'The Sociology of Law'. London: K.K.P.

upon the owner but it doesn't determine his action. Cutler et al appear to argue a somewhat similar position by stating that law is a condition of existence of determinate relations of production. For them and for Renner the law/economy relation is not posed as the determination of one by the other, that is to say, as a unilateral determination of law by the economy or vice versa. On the contrary political process is the key to the law/economy relation. For Renner, it takes the form of a functional or institutional mediation or connexion between law and economy and for Cutler et al it takes the form of conditions of existence and the political and social practices which meet those conditions. In the last resort Cutler et al also have no choice but to rely upon some sort of functional explanation of the relationship between law and economy.

In the context of their radical separation of law and economy the notion of conditions of existence does not, of itself, entail a break with other theories of law and economy. To use Kuhn's modest phrase, Pashukanis 'anticipated' Cutler et al in his use, albeit an ambiguous use, of the notion of law as a condition of existence of relations of production. This specific continuity with certain aspects of the work of Pashukanis and Renner is matched by their collective adherence to a general separation of law and economy as distinct realms.

Cutler et al on law and economy can best be summarised by the following statement of their position .... "Capitalist forms of possession are ... dependent on definite legal and political conditions of existence".<sup>(47)</sup> This statement contains two important implications:-

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(47) Cutler et al. (1977) 'Marx's Capital & Capitalism Today', London. R.K.P. Vol. I, p. 246.

(1) In that 'capitalist forms of possession' refers to the specific form of social possession entailed in capitalist relations of production. Some "... definite social form of possession of the means and conditions of production" is necessary for production to take place at all.<sup>(48)</sup> Possession, in some form or another is a precondition of all production, it is a universal requirement of production. If production then 'possession' must have already been secured is the form of their argument.

(2) Forms of possession are firmly separated from their legal conditions of existence. Production and law are two distinct realms and 'possession' is divided according to its juridic and economic aspects.<sup>(49)</sup> 'Forms of possession' refers to the mode of exclusive possession of the means of production and the ability to set production in motion. The legal conditions of an exclusive possession are many and varied. No one legal form 'corresponds' to a particular mode of exclusive possession, no one legal system is entrenched in and secured by a particular mode of production. There is no reason why law cannot be equally functional for diverse relations of production. For example, the individualistic form of juridic property can function equally well as a condition of entrepreneurial relations of production and as a condition of corporate relations of production - providing that the corporation is viewed as an economic agent in its own right. Law despite its position as a condition of determinate relations of production and despite the apparent specificity of law vis-a-vis determinate relations of production appears to reduce to an empty instrumentality, a form with no content. The functional circle would seem to be closed.

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(48) Cutler, et al (1977) op cit. p. 220.

(49) ibid p. 244.



Cutler et al end up embracing a functional explanation of the relation between law and economy by virtue of the manner of their rejection of determination in the last instance by the 'economic' - whether the economic is conceived as forces or relations of production. They argue as follows "To say that capitalist relations of production presuppose a legal system with definite forms of property and contract is merely to specify some abstract and general conditions which a legal system must meet if it is to be compatible with capitalist production. But the concept of determinate relations of production does not tell us in what precise form those effects will be secured nor does it tell us the precise character of the relations which secure them".<sup>(50)</sup> The effects pre-supposed in specifying determinate relations of production are defined as the conditions of existence of those relations. Since capitalist relations of production require that means of production and labour power take the commodity form a legal system is required in order to define and sanction property in the form of commodities and to specify and guarantee contracts of sale and purchase.<sup>(51)</sup> The nub of their argument is that if there are capitalist relations of production then a legal system of a specific character must 'emerge' to service or facilitate them. The general concrete relation between law and economy is quite definitely absent and it is absent on the sole condition that the connexion can only be specified either as an abstract functionality or as empirically diverse. Any other connexion reduces to the economy effectively specifying and securing its own conditions of existence,

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(50) Cutler et al (1977) Vol. I, p. 208 op cit.

(51) ibid p. 208.

its own specific legal forms. This argument follows whether the mechanism which relates law and economy is the correspondence or non-correspondence of forces or relations of production leading to the necessary establishment or re-establishment of an equilibrium or, whether the economy delimits the 'form', or the structural features, of law and indicates only a residual role for the exercise of relative autonomy. Even though both conceptions presuppose the distribution of social space between legal and economic realms the economic and legal can have no separate existence in either conception. Cutler et al argue that they can have no separate existence since forces or relations of production presage or predetermine the corresponding legal forms or contents and thus create their own conditions of existence and, therefore, themselves. Both variations collapse because of their internal contradictions. Although far from providing a way out of this impasse the concept of relative autonomy would only compound the problems it supposedly solves - not least among them being that autonomy, in being qualified, is emasculated.

Strictly speaking, for Cutler et al, there is a further distinction between "... conditions of existence and the social relation and practices which provide them".<sup>(52)</sup> Whereas conditions of existence can be 'inferred' from the concept of determinate relations of production the means and the form in which these conditions are provided cannot. On one side there are relations of production which specify their conditions of existence in purely abstract 'quasi-functional' terms and, on the other, there are the means of rendering those abstract functional conditions a specific form. In 'precapitalist modes of production' Hindess and Hirst were able to

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(52) Cutler et al (1977) Vol. I, p. 219. op cit.

argue that the economic is determinant "... in the sense that the conditions of existence of the dominant relations of production assign to each of the (structural) levels a certain form of effectivity and mode of intervention with respect to the other levels".<sup>(53)</sup>

This position is now explicitly rejected. In the earlier work the task of providing conditions of existence was assigned to structural levels within the mode of production. These conditions were secured by rational extension from the concept of the mode of production or relations of production whilst a measure of regional autonomy was retained with respect to the empirical means by which those conditions were eventually secured, and with regard to their final 'form'.

The difference between a relation whereby the conditions of existence are secured through being assigned to specific levels within a structured totality and no relation at all, in a word, the difference between Hindess & Hirst's previous position and Cutler et al's current position, is at first sight considerable. Aside from rejecting the concept of mode of production as a structured totality determined by the economic in the last instance Cutler et al only remove the idea that law and economy are in any <sup>general and necessary</sup> relation at all from their present position. In the abstract sense there is a 'quasi-functional' relation between law and economy which derives from the logical necessity of law for economy. They argue that if determinate relations of production obtain, therefore, so must a law of contract and a law of property. In a word this is a logical analysis couched in functional terms and demonstrated entirely within 'discourse'. At the same time, however, the legal institutions of property and contract in their empirical diversity fulfill those abstract functions - not by any necessity, rational projection or extension

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(53) Hindess & Hirst, P. (1975) op cit. p. 13.

but by a process subject to specific conjunctural determinants. The analysis ends there, some attempt at introducing political process, pragmatic considerations or emergent studies in legal development may be made but the end result is the same. Cutler et al have produced the most radical form of the separation between the specific 'empirical' form of legal institutions and the logical-functional complex of relations of production and their conditions of existence. The attempted rejection of all epistemology, and hence all modes of representation or correlation between discourse and reality, has, paradoxically, ended up reproducing discourse on one side - relations of production and the conditions of existence which can be inferred from them - and, on the other, the 'empirical' diversity in which the law of contract/property is realised in specific conjunctures. Therefore, Cutler et al appear to produce what amounts to the same combination of rationalist and empiricist conceptions for which they berate classical Marxism.<sup>(54)</sup>

#### Law & Society.

The analysis of law and economy does not only surface specifically in those works which take the idea of a relation between law and economy seriously. The relation is often subsumed under more general considerations which take the law/society nexus as their point of departure. A common theme persists in these positions: a theme which is reflected particularly in the work of Alice Tay. The theme in question stresses the intactness of the concept of juridic property whilst noting the proliferation of different types of

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(54) Cutler et al (1977) op cit. Vol. I, p. 220. Although it should be added that they refuse to recognise the conventional distinction between discourse and reality on the grounds that it invariably privileges one form of epistemological relation over another, they argue that any such privilege can only be accorded by fiat. Therefore, the distinction between knowledge and being is artificial.



property. This proliferation does not affect the abstract concept of private property but merely induces specific regulations for, or against, distinct types of property (Tay) or; the development and extension of various satellite institutions in order to square jural and economic reality (Berle & Means) or more consequentially, the mutual transformation of deeper legal realities and social relations in the context of abstract juridic stasis (Gurvitch).<sup>(55)</sup> In almost all these formulations law appears as an abstract positive residue whilst its institutions, functions, manifest variations or its relation with forms of sociality are granted at least a measure of 'autonomy'.

From the standpoint of an examination of the relation between Law and economy these approaches mark a considerable distance from the work of Pashukanis and Balibar. Whereas Pashukanis sees that the essence of law is inextricably bound up with its form, a form which in relations of commodity production is stamped throughout with notions of equivalence derived precisely from those same relations, the above theorists, with the possible exception of Gurvitch, each seem to insulate the realm of law from its concrete social functions. There is also a considerable difference between Balibar's position on law as an instance of the social formation ultimately determined by the relations of possession of and separation from the means of production and a position which holds that law is distinct with regard to its juridic and its functional/institutional aspects. The particular problems involved in the former in no way provide grounds

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(55) See Tay, A. 'Law, the Citizen & the State' in Kamenka, E. et al (eds.) (1978), 'Law and Society', London: Edward Arnold; Berle, A. & Means, G. (1967), 'The Modern Corporation and Private Property' New York: Harcourt Brace and Gurvitch, G. (1947) op cit.

for the acceptance of the latter. Pashukanis' economism is matched by the basic instrumentalism with respect to law of, for instance, Renner, Tay and to a much lesser extent, Gurvitch, but it is not transcended by it.

It has been argued that the inadequate specification of law/economy stems directly from the failure to pose the initial problem in the proper manner. For example, the concept of a relation between law and economy is inadequate to the relations under consideration namely, the ownership of /separation from the means of reproduction of material existence. If this argument is sustained then the twin problems of Economism and Instrumentalism are each the result of conceiving the 'economic' and the 'legal' as separate realms so that the one can then be reduced to the other - as in economism - or used by the other - as in Instrumentalism. Alternatively, if the two instances are not assumed to be distinct concepts ultimately referring to different ontological objects and if the relations of ownership of/ separation from the means of re-production of material existence are sharply focused then it is possible to avoid both economism and instrumentalism and, it is argued, the pitfalls of positivism and functionalism.

To develop this further, there is a profound difference between the reduction of a legal instance, qua instance, to the economic instance and the radical dissolution of instances - economic and juridic - as such. Consequently, all that is left in this formulation, is the mode of possession of, and separation from the means of production. In other words the social relations of reproduction of material existence in their entire complexity. This would seem to avoid the reliance on structural determination, or co-ordination, of instances of the mode of production and the ultimate drift into economism; it avoids the economism of, for example, Pashukanis; and it avoids the

positivism and instrumentalism of, for example, Renner. It also avoids the functional hybrid proposed by Cutler et al. But does it reduce the specificity involved in the analysis of law/economy with the result that the concepts involved are inadequate to law and economy? Or, on the other hand, does this formulation drift into a more profound economism reminiscent of certain aspects of Pashukanis? The answer depends in part on the realisation that in order to posit the 'juridic' aspect of relations of production it is not necessary to invoke an abstract connexion between a juridic instance, superstructure, or form and an economic process. The position advanced here only indicates the developed concept of relations of production, i.e., the regulation of possession. The object addressed by Sociology is the social relations of reproduction. It is not the case that there are two separate forms of discourse that is to say a political economy of economic processes and a jurisprudential analysis of Law.<sup>(56)</sup> Nor is sociology applied in positivist fashion to a pre-existent jural reality. Whether or not this procedure induces a lack of specificity and whether any loss in specificity is crucial, remains to be seen in the context of the analysis of 'property' outlined below. As for the second question it is difficult to envisage how this position can be construed as economism because in the absence of separate instances the concept of reduction, so crucial to economism, is also absent.

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(56) Of course it is quite evident that such a jurisprudence and a form of political economy do 'exist'. The point, however, is that as far as the relationship between law and economy is concerned the communion of separate forms of academic discipline must, inevitably, produce purely arbitrary versions of the relationship.

To deny the necessity of baptizing instances of sociality as 'legal' and 'economic' orders is no mere idiosyncrasy for, in certain respects, this sort of solution has a very real sociological pedigree. For example, from within sociology the most interesting proponents of an alternative solution are, respectively, Parsons and Weber. Whilst not directly concerned with 'law', the remarks of Parsons on the 'economy' are especially pertinent. As Savage says of Parsons: "Parsonian theory has elaborated what is undoubtedly the most rigorous and systematic analysis of the economic/non-economic relation that has been produced from within sociology".<sup>(57)</sup> Accordingly, Parsons is interesting at this juncture mainly for the way in which he approached the essential problem of the relationship of economic to non-economic phenomena. Without dwelling too much upon whether or not he was successful in this venture (and on balance there are serious problems with his work) it is sufficient to note here that Parsons quite clearly rejected the reduction of non-economic factors to economic phenomena. Instead he posed the universality of a theory of human action as the basis for any integration of sociology and economics. Thus economic theory is but a special case of the general theory of the social system and the so called 'economic' sphere but a sub-system of the general social system. The economic and the non-economic are conceived in terms of their specific forms of organisation centred around different functional items differentiated by the division of labour along functional lines. Thus the economic is both autonomous and functionally

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(57) Savage, S. (1977) 'Talcott Parsons & the Structural-Functionalist Theory of the Economy' in Hindess, B. (ed). (1977) 'Sociological Theories of the Economy', p. 1, London:



interdependent, manifesting both the properties of a sub-system and those attached to it as a component of the larger social system.<sup>(58)</sup> Whilst Parsons clearly poses the problem in a radically different way - and given that the origins and the content of the arguments are quite different - the formal similarity of *Economy and Society* with the Althusserian notion of the totality and the structural articulation of relatively autonomous instances or levels should not be ignored. Likewise the notion of conditions of existence is not altogether different from that of functional pre-requisites.

Parsons, therefore, attempts to produce a genuinely social analysis of law and economy. There are no prior grounds within Parsonian discourse for distinguishing between the two except insofar as they are but two special cases of the larger social system. Accordingly, the relation between Economics and Sociology and thus between economics and law should be regarded as a relation integral to sociology rather than as one forged between separate disciplines. This much is quite clear in '*Economy and Society*'. It is in this sense, and perhaps in this sense alone, that Parsons work illuminates the issue of the law/economy relation.

Weber on the other hand poses an elusive, even coy, relationship between law and economy. For Weber, the relation of law to economy is to be found in principle in the normative orientation of persons engaged in social action.<sup>(59)</sup> Thus the relation of 'law' and 'economy' resides in the recognition of legal norms by persons engaged in 'economic' action together with their particular orientation toward those legal norms. Accordingly, the ideal of legal order and the

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(58) See Parsons, T. and Smelser, N. (1956) '*Economy and Society*', London: R.K.P.

(59) Weber, M. (1968) '*Economy & Society*' Vols. I & II, New York: Bedminster.

actuality of economic conduct is spanned by the is/ought distinction. Thus 'law' and 'economy' are related through the role of law as an actual determinant of human (economic) action. The role of law is here quite clearly counterposed to its more abstract location as an ideal juristic system. What is important for the law/economy relationship is the orientation of persons engaged in (economic) action toward legal norms, whether that orientation is obedient or defiant and so on. Therefore, the relationship is contingent upon the subjectively held motives for compliance or deviance and the law/economy relation is but a special example of social action in general. This is indeed the important point for it emerges that there is no reason why the relationship should be abstracted from its social context, no reason why law and economy should be regarded as separate orders which are externally related. Instead, the relation is seen as a basic constituent of social action. Of course the role of law is here separated from the juristic structure of law and to that extent is reminiscent of Renner's work. Likewise the theory of social action is subject to quite specific criticisms. But we are primarily interested in the way in which the problem is posed rather than in the particular solution.

More specifically, law is not represented in any simple way as a condition of existence of exchange or the production of commodities. Instead, economic activity can, in principle and in practice, proceed without reference to any external instance which guarantees contracts or proprietary rights. Rather economic activity can proceed in relation to its own consensus, egoistic interests or expedient rationality. Weber gives the example of the stock exchange and certain 'cartel' agreements. For these law may prescribe a certain durability for existing economic relations and indicate a certainty

that promises will be kept but it is not a necessary prerequisite.<sup>(60)</sup> Although Weber also argues that law can elicit certain types of economic relations and that the development of a complex economic system is unthinkable without 'law'. But in this sense the development of law is heralded as a special case of the development of bureaucratic rationality.

### Property.

So far the discussion has centred upon the general interrelation of economic and legal relations. There is, however, a pertinent relationship between 'property' and the 'law' of property. This relation involves the issue of how the 'corporate' form of ownership 'emerges' within the legal framework of private property. This relation is of direct concern to the very possibility of the legal regulation of monopoly since the form of ownership and the structure of law are quite basic to anti-trust legislation. What then do we mean by private property?

"Private property, by its very nature, secures the owner special rights over and against all non-owners. It is essentially a negative notion, an assertion, backed by the full co-ercive force of society, that one man may exclude others from using or benefiting from whatever it is he owns if he so desires. It assumes the possibility - no, the inevitability - of a clash between what he wants to do with his objects and what others want to do with them".<sup>(61)</sup>

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(60) Tom Hadden makes a similar point regarding the de facto existence of joint stock enterprises before the corresponding legal form allowed such undertakings. See Hadden, T. (1977) op cit.

(61) Ollman, B. (1977) 'Marx's Vision of Communism'. Critique 8 p. 26.

Private property, then, is a relation of exclusion of all others, a relation which excludes on the condition that it guarantees absolute power of disposal over the object of property, absolute freedom to use and consume that object as one likes. The juridic form of property may vary, for example from a relation of exclusion (this is essentially true/<sup>of</sup> Continental Law) to the empirically specifiable restraints on others from interfering in one's property (English or Common Law). Nevertheless, property as a relation is the essential element of private property as is the absolute power over the means of its disposal. To be sure such absolute power may be qualified through a series of specific injunctions but it still operates as a basic premise of private property.

The way in which the concept of ownership and in particular that of private property is able to encompass a changed set of socio-economic relations is of central concern to the very issue of legal regulation of corporate affairs and more especially monopoly. For the most part the question is normally asked in two different ways. How does the concept of juridic property alter to accommodate a change in economic structure or else how does it manage to stay the same and still adequately express sanction or structure the changed economic relations? The prior question of whether it is appropriate to view legal and economic relations in such a way that one is in advance of the other, which is thereby rendered obsolete, or whether it is proper to regard law as capable of keeping up with economic changes is normally absent from any discussion. Thus the evident 'dissolution' of property into relations of possession, title and control characteristic of the 'corporate economy' somehow expresses a set of relations of production entirely distinct from those relations characteristic of entrepreneurial capitalism. Such a change in 'factual' property engenders a corresponding shift or trend in juridic relations of property



For example, Winkler appears to see the possibility of the corporate economy, or rather 'corporatism', as the harbinger of a distinct corporate law.<sup>(62)</sup> Pashukanis sets out the elements of a corporate form of law which is in tune with a changed set of relations of production, the partial suppression of commodity exchange at the level of production (between components of the corporate empire) has profound effects on the form of law based on the importance of commodity exchange. This follows since a separation between enterprises is necessary for exchange to proceed in commodity terms. Insofar as this separation is limited - through the growth of conglomerate forms of enterprise - then so too must the notion of equivalence in law be subject to substantial modification, if not actual redundancy. On the other hand Cutler et al seem to argue that there is no contradiction between the private property form and relations of corporate production providing that the corporation is seen as the agent of possession, providing that is that it absorbs all the functions of property through the exclusive possession of the means of production. Likewise Renner views it as a change in function, and Tay as an alteration of type.

Two tasks immediately present themselves - First of all, it is necessary to adequately theorise the relation of ownership of /separation from the means of production in the context of the separation of the components of property into title, possession and control. And, secondly, what are the effects, or the conditions, of such a separation on the structure of juridic property? In short, what is the relation or identity between law and economy? This relation should properly be founded internally on the basis of the relation of ownership of /separation from the means of production rather than externally as the abstract interaction of two autonomous instances.

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(62) Winkler, J. (1976) 'Corporatism', European Journal of Sociology 17/1.

Accordingly, the fundamental issue for a sociological analysis of 'property', to borrow terms from Cutler et al, is the distribution and organisation of the means of production. It is the social relations of production, the separation from /possession of the means of production, which must be grasped in their specificity if an analysis is to be at all adequate to its object, the analysis of ownership. As has been noted already this approach does not admit of pre-existing levels - economic and legal - which can then be brought into relation, one with the other. Instead 'property' is best conceived in its distinct and varying aspects, through its own 'historical' time and by reference to the components which it brings into relation or separation.

The starting point then is the double separation of workers from the means of production and of enterprises from each other. The mode of articulation of the different components of these separations is crucial to any analysis of the concepts of 'possession', 'control' and 'title'. These concepts are in turn essential for the adequate specification of corporate relations of production, on the one hand, and the various limits inscribed on the effectivity, object, and purpose of anti-trust legislation, on the other. Furthermore, each separation from the means of production implies a corresponding 'detention' of the means of production or, the general relation 'ownership of /separation from'. As a constituent of ownership possession is lodged in the day to day relation of management whilst two further separations secure the isolation of workers and shareholders from the enterprise. Insofar as 'private property' can only be defined as a specific mode of organisation of the components - possession, title and control - based on clearly defined powers of disposal secured through the relation of exclusion then it is unnecessary to comprehend the relation of the law of property and property as a relation between

law and economy. Further, within the corporate form these components are subject to a re-ordering based, not on private property but on another mode of articulation or organisation of these elements one to another. This change defines the essential difference between what is known as entrepreneurial capital and monopoly capital. Accordingly the social relations of production and ownership are transformed with the result that the concept of legal lag or legal functionality is perhaps inappropriate.

To some extent then the juridic concept 'property' is devoid of meaning outside its definition as a relation of exclusion - as a relation of possession of /separation from the means of production - and as the absolute power over the property object in question - relation of control and, in part, title. Thus 'private property' constitutes a particular co-incidence of these elements of ownership or the location of possession, control, and title in one (individual) bearer, 'entrepreneurial capital'. Several consequences follow from this analysis.

(1) The distinctly legal character of property relations derives solely from the co-incidence of the elements - possession, title, control - in one agent. This, no more, defines the specifically juridic character, and the ideological appeal, of the property relation. It does not represent the intervention of a distinct juridic level, merely the direct (organisational) presence of legal 'relations' in the actual organisation of production. Thus the necessary presence of so called legal relations should not be viewed as a one to one correspondence of 'property' and the law of property nor as the dependence of economic relations on legal conditions but rather as an integral appearance. Whereas there may be some sort of distinction between production relations and legal relations there is no reason why this distinction should take the form of ready made instances.



Furthermore, from the point of view of the interrelationship of law and economy, legal and economic relations cannot be crystallised out as separate instances since they form a complex unity. In a word the consistent interrelationship of law and economy implies the possibility, even the necessity, that their status as instances is immediately dissolved.

(2) Since private property is defined as a particular mode of arrangement of the elements of the relation 'possession of /separation from' the means of production then juridic property can have no separate existence apart from those relations - either as part of a superstructural level or as a separate 'form'. This is not to say that private property, as a relation, reduces to the elements of control, possession and title that is, to the 'economic' relation of possession of /separation from the means of production. It refers only to the fact that private property, as a relation of articulation, cannot be specified apart from the elements which it brings into relation. Private property cannot be specified independently of these elements nor does it reduce to them. Thus private property is a form of organisation based upon the centrality of the human (entrepreneurial) subject. Accordingly, the legal doctrine that private property is indifferent to its function whilst quite correct as far as it goes is both irrelevant and even a little misleading from the perspective of the interrelation of 'legal' and 'economic' relations within a general concept of 'ownership'.

(3) The comparative dissolution of private property into its separate components is best represented as the establishment of a new mode of articulation between these components based on their separation rather than on their unity. The juridic aspect of the relations of production, private property defined as a mode of articulation of the elements possession, control, and title does not give way to a distinctly



corporate system of law or juridic relations - as, for example, Winkler maintains - but instead the elements which private property relates are brought into a different relation, a relation of separation. There is no system of corporate law which can, for example, be plugged in to the monopoly capital mode of production. As far as the relations of production are concerned all that is important is that possession, title, and control are brought into a new relation with each other. These elements together with the mode of their articulation, can both be derived from a sociological analysis of 'ownership' and therein lies the importance of the analysis developed in this section.

## CONCLUSION

This chapter has suggested that there is no reason why law and economy should be regarded as separate orders of sociality. It has been argued, moreover, that this portrait of society entails problems which are inherently intractable. For example, issues of legal or economic priority, reductionism, idealism and essentialism, to name but a few, each depend upon the prior separation of law and economy. Although the problem is by no means purely academic involving analytic issues alone, it will become apparent, in subsequent chapters, that the prior separation of law and economy prepares the way for the very idea that the legal regulation of economic affairs is a valid exercise. Hence the issue is of direct concern to any analysis of anti-trust legislation, and is far from being just an abstract or semantic issue.

Over and against the prior separation of law and economy it has been argued that private property does not exist first of all in a legal sense and only then, that is, subsequently, does it entail social and economic effects according to the particular manifestation of the private property 'form'. This sort of perspective, just as much as positions which reduce law to an epiphenomenon of the economy, depends upon a prior allocation of social space into distinct legal and economic orders. As we have seen this particular division heralds a number of problems. Although it is not so much that economism, idealism and functionalism and so on are wrong as that they represent the inevitable alternatives once the problem is posed in a particular way. On the contrary then it is the prior allocation of social space into legal and economic realms which constitutes the nub of the issue. Until the problem of the relation of law and economy is posed in a radically new way, not as a relation between separate items of sociality but rather as a complex fundament of ownership, then the issue is doomed to the

mere re-iteration of contradictory and essentially circular 'solutions' or alternatives.

It is argued here that a sociological analysis of ownership meets certain of these requirements. For example, a sociological analysis is pertinent for at least three reasons:

(i) The conception of ownership as the mutual articulation of the social relations of control, possession and title means that the relation of private property is regarded as internal to the organisation of production. Accordingly, private property is not regarded as a legal concept which has economic effects but as a basic constituent of social relations.

(ii) A sociological analysis of ownership in its widest sense entails a scope which is denied law or economics. Hence, the somewhat arbitrary combination of a Marxist theory of law and a Marxist theory of production is avoided as are the pitfalls involved in a sociology of law.

(iii) Finally, a general typology of ownership accords with the classical relevance of 'law' for sociological consideration. This particular relevance is all too easily shunted off into a sub-discipline namely, the sociology of Law. It is arguable that Marx, Weber, Durkheim, Gurvitch and even Parsons each addressed 'law' as a fundamental article of their sociological endeavour rather than as a discrete side line of (empirical) research.

For all these reasons then, a sociological analysis of ownership provides a proper foundation for a realistic assessment of the issue of legal regulation in general and the nature of anti-trust legislation and the 'corporate' form of ownership in particular.

CHAPTER III

LAW, PHILOSOPHICAL ANTHROPOLOGY  
AND THE CONCEPT OF PRIVATE PROPERTY.



We have seen in Chapter two how the very possibility of anti-trust legislation depends upon the idea of the legal regulation of economic affairs and thus upon a particular conception of legal and economic relations as separate domains. It can be argued, however, that the way in which law and, more especially, anti-trust legislation perceive the reality of economic relations is also a vital constituent of any sort of 'legal' regulation of monopoly. Therefore, not only does anti-trust legislation appear to depend upon the idea of legal regulation but it also references a particular view of corporate reality. Accordingly, it will be argued that the corporate form of ownership and the twin concepts of private property and economic liberty are quite basic to the whole notion of anti-trust legislation. However, having made that declaration, how are we to understand the development of the corporate form of ownership in relation to the seemingly enduring concept of private property?

Private property, like monopoly, is a form of exclusive ownership but, this similarity apart, they evince radically different types of ownership. In order to demonstrate this it is necessary to put forward a typology which respects the basic differences between each type of ownership but which, nevertheless, allows some sort of comparison. Instead of arguing that private property is an entirely abstract concept which is hopelessly overwhelmed by the reality of the modern corporation or, conversely, which is fundamentally transformed by 19th and 20th Century developments leading to the giant conglomerate form of business, it is necessary to understand the basic meaning of 'ownership'. Drawing on the argument put forward in the previous Chapter, it is suggested that ownership requires a rather different examination, one which does not create an artificial distinction between legal concepts and economic functions, or between 'legal' and 'economic' ownership. On the contrary, it is

argued that the proper procedure is by means of a demonstration of a sociological typology of ownership which addresses 'ownership' as a fundamental aspect of social structure rather than as an epiphenomenon of 'real' control. Such a typology would have the added advantage of creating the possibility for the realisation of the basic elements of anti-trust legislation in a form commensurate with the basic parameters of the anti-monopoly movement namely, in terms of the crucial 'contest' between entrepreneurial and corporate forms of social organisation.

The typology itself will be outlined in Chapter four. As a prologue to its demonstration it is necessary, however, to pose what appears to be a very basic question; namely, what is meant by the concept of ownership? This Chapter will endeavour to address this question with a view to establishing why it is that the 'legal' view of ownership is dominated by the concept of private property and thus is skewed toward one particular type of ownership. Furthermore, it will be suggested that this one dimensional view of ownership contributes substantially to the basic misunderstanding of corporate relations and that this in turn hampers the effective regulation of monopoly. This involves demonstrating a number of things. First of all, the conditions under which what we shall call 'Philosophical Anthropology' is inscribed within the very structure of private property. Secondly, how the legal view of ownership is influenced by the concept of private property. And, finally, why this generates problems for the legal regulation of monopoly? It will be argued that the hegemonic influence of Philosophical Anthropology on the concept of private property and of the idea of private property on ownership leave 'law' relatively powerless in the face of forms of ownership which cannot be expressed via the language of private entrepreneurial property. Accordingly,

'corporate' forms of ownership are outwith the remit specified by forms of regulation derived from the legal concept of private property. Of course, there have been a number of specific legislative attempts to remedy the defects generated by the 'legal' portrait of corporate relations and these will be examined in Chapter five. In the final analysis, however, it will be argued that these attempts not only do not remedy these defects but in some cases exacerbate them. Accordingly, it is the very structure of 'legal' regulation and the concepts available to it which account for the relative failure of anti-trust legislation rather than, for example, the bad faith of legislators or the political dominance of big business.

#### Philosophical Anthropology:

What then is meant by Philosophical Anthropology? It refers to the reduction of the social world to the activities of an original producer, man. For example, this tendency is realised in the earlier work of Karl Marx by the argument that in the process of production man creates an object in which are fixed his essential attributes. Man is separated from whatever it is which is essential in him through its externalisation in what then becomes an alien object. As Ranciere indicates, the general structure of the argument concerns the general form of Subject— Predicate — Object.<sup>(1)</sup> In effect the essential attributes of the human subject namely, the predicate, become fixed in the object which he creates. Since the object now contains the essence of the subject, this object becomes

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(1) Ranciere, J. (1971) 'The Concept of "Critique" and the "Critique" of Political Economy' in Theoretical Practice, 1.

the real subject. Thus, whereas man starts off by being a subject the process of production ensures that his very subjectivity is embodied in the object which he creates. Accordingly, subject and object swap places, man becomes a mere object and his product takes up the mantle of subjectivity. The objective world is but an expression of the essence of man. Therefore, Philosophical Anthropology can be defined as the overlapping of an analysis of the relations of production, ownership and so on, by the 'anthropological structure of Subject— Predicate — Object.

The analysis of ownership within the perspective of Philosophical Anthropology is but one example of the more general separation of man from his essence. It follows that the reduction of various forms of ownership to the limiting case of private property is the means whereby the general separation of subject and essence is manifested as a specific separation. In a word, it is because of man's relation of himself as a subject to his own product as an external object that things can be owned, products alienated and commodities exchanged. In this way, the theory of ownership is overlapped by the anthropological structure of Subject — Predicate — Object. This overlap results in the derivation of the private property relation from the primary alienation of man's productive capabilities; the separation of man from his product through exchange results in its re-possession by some other (human) subject. Otherwise the private property relation would have neither utility nor meaning. The concept of legal rights implies this prior separation of a (human) subject and his essence since the idea of a right in any particular object requires the notion of a privileged connection between subject and object. Thus the private property relation is derived by analogy with the logic of Subject — Predicate — Object. Furthermore, as we shall see the relation between



subject and object becomes a relation between subjects and the existence of a legal 'right' connotes the essence of proprietorial subjectivity. Legal 'rights' are, therefore, the guardian of both the real and the human subject with the result that private property is at least on an equal, if not superior, footing with man.

What are the specific examples of Philosophical Anthropology's incidence on a theory of ownership? The primary influence of Philosophical Anthropology on ownership is engagingly simple: just as it can be argued that, for Adam Smith, a Philosophical Anthropology of the subject, man, and the factory stand instead of an economic 'system', so too, does a Philosophical Anthropology of the subject, man, stand instead of a general typology of ownership.<sup>(2)</sup> This 'masquerade' entails the reduction of all forms of ownership to the essential (human) subject together with a form of essentialism which holds that the essence of man both permeates and is the measure of all material reality. It is important to realise the full implications of this essentialism, for in order to successfully achieve the reduction of all social life to the projects of human subjects, it is necessary to establish the requisite connection between social relations, social life and the material world, on the one hand, and the essential human subject, on the other. Reductionism presupposes the efficient translation of concepts specified at one level into concepts specified at another, usually 'lower', level of 'existence'. Thus the main assumption of Philosophical Anthropology is that all social life can be explained with reference to the primacy of the essential (human) subject.

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(2) See Tribe, K. (1978) 'Land, Labour and Economic Discourse' London: RKP. p. 2.

Therefore, the human subject is seen as a constitutive essence.<sup>(3)</sup> The two are co-extensive; just as social life is nothing but the manifestation of the human essence so too does social life reduce to the various attributes of the abstract human subject. Accordingly, the subject is an 'ideal' essence precisely because it can be separated from its original location, man, and transposed into a theory of property 'rights'. Or, to put this slightly differently, the world of social relations only becomes intelligible in terms of the centrality of the subject, man, by arguing an 'equivalence' between man the producer and the objects which he produces. This equivalence is provided by the concept of an essence which expresses the attributes of the subject, man, but which at the same time can be alienated in the object that he produces. Thus the position of the human essence in the anthropological scheme provides a mechanism for the reduction of all forms of ownership to the primary relation of the subject and the object of ownership, to the essence of man as producer. The idea of an original relation of ownership is directly sustained by the Philosophical Anthropology implicit in the structure of Subject — Predicate — Object. Thus, the very fact that the structure of Philosophical Anthropology namely, the Subject — Predicate — Object sequence, provides a mechanism for the translation of a human into a transcendental subject means that there is a unique relation between the (objective) social world and the individual (human) subject.

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(3) For example, Althusser argues that "If the essence of man is to be a universal attribute, it is essential that concrete subjects exist as absolute givens; this implies an empiricism of the subject. If these empirical individuals are to be men, it is essential that each carries in himself the whole human essence, if not in fact, at least in principle; this implies an idealism of the essence. So empiricism of the subject implies an idealism of the essence and vice versa". Althusser, L. (1969) 'For Marx' London: Harmondsworth, p. 228.

The unique relation is constituted by means of the essential attributes of the human subject being taken up and transposed into an external, dominant, subject. Similarly, private property starts off by representing a relationship between a human subject and an object but very quickly we find that private property is defined as a relation between subjects, actual and potential proprietors. Accordingly, the classic derivation of private property rights starts off from the assumption that man, as possessor of himself, is, therefore, possessor of his attributes. For example, his labour power and the products of his labour belong to him. This conception forms the basis of the legal concept of ownership and provides the key to all forms of ownership specified within law.<sup>(4)</sup> The matter does not rest there, however, for although this original or unique relationship of man to his product may provide a blueprint for other forms of ownership it cannot generate those forms without recourse to the logic of Philosophical Anthropology. Therefore, this unique connection is transposed into a more elaborate theory of legal rights. Since the relation between subject and object depends upon the fact that the object contains the essence of subjectivity (the attributes of the original subject) then the proprietorial relationship can be defined as a relation of subjectivity. If this original relation is to be a prototype then there must be other relations of subjectivity which do not depend upon the fact of creation as a guarantee of ownership but rather recognise the existence of other subjects who may own the object in question. Furthermore, if this original justification of ownership as the possession of ones attributes is

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(4) For example, Bentham, Locke, Mill and T.H. Green each subscribed to the 'labour justification of Property'. See Macpherson, C.B. (ed.) (1978) 'Property', Oxford: Basil Blackwell.



to have any meaning then any form of ownership by someone other than the original producer must have the same status. Thus, all relations of subjectivity must be identical and private property be defined as a relationship between formally equal subjects. Furthermore, they each entertain a relationship with an object which contains the resultant of human subjectivity. Therefore, private property is defined as a tripartite relation between subjects with regard to a third real or corporeal product of (human) subjectivity. From there on any relation of private property must have an equal status with any other. Moreover, private property can then be defined as the existence of a relation of subjectivity which depends upon the effective exclusion of all other relations of subjectivity. These relations of subjectivity only express a package of human attributes and need not reference actual human subjects but can include non-human forms. Although it must be remembered that such apparent versatility depends upon these respective actors being viewed as essential subjects.

Finally, there is no reason why the subject in question must be a prior-proprietary subject or an epistemological-ontological point, that is 'given' to legal discourse.<sup>(5)</sup> The whole edifice of legal ownership described above can just as easily be constructed wholly within legal theory as be<sup>-ing</sup> supplied by the prior existence of 'economic' subjects. There is no necessary reason why the subject of private property must reduce to a pre-given economic subject since we are talking, primarily, of the legal view and justification of private property rights. It is argued, therefore, that this is the way in which law conceives of ownership and not that ownership takes this

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(5) See, for example, Hirst, P. (1979) op cit. Appendix 1.



form because of the prior existence of economic subjects and their role in exchange. Indeed, we shall see below how the logic of Philosophical Anthropology is both incomplete in itself and inadequate to a proper analysis of ownership.

The basic requirements of a Philosophical Anthropology of the subject, man, lead on, quite naturally, to the various manifestations of its influence - namely the distortion induced by the structures of Subject - Predicate - Object. Of particular concern here is the manner in which Philosophical Anthropology impinges on the concept of ownership and the consequences that follow for a general theory of ownership that rests on an implicit Philosophical Anthropology.

It should be clear by now that the object of criticism and the obstacle to any general theory of ownership concerns the philosophical analysis of the position of man in relation to the social or material world; a position that reduces the existence of social relations to the expressive or purposive activity of an essential man; a humanist ontology which firmly locates man as the axis and the source of all social relations. Whilst it may be true, in a generic or original sense, that man, in tandem with nature, produces material reality as we know it, two reservations may be made concerning this particular point. First of all, the argument that man, in producing objects, is externalising his essential attributes is based on a false analogy with the production of God by man. Ranciere demonstrates the way in which the young Marx achieves this slide. He argues, that in the production of God by man, there is an actual equivalence between man and his product, man objectifies the predicates which make up his essence, God only equals man's predicates, nothing more. Therefore, God is a transparent object in which man can, first of all, see himself and, secondly, re-appropriate that which he alienated, his essential attributes in other words. The absurdity is revealed when it is

considered that the worker and his product are supposed to be equivalent, that the product is supposed to represent nothing but man's essential attributes, his essence, and that the worker's product is supposed to be something in which the worker should recognise himself. The manifestation of generic life is equated with the means of maintaining individual existence or "... the productive activity is identified with the generic activity (the activity of man insofar as he affirms his own essence) and the object produced is identified with the objectification of the generic being of man".<sup>(6)</sup> In brief, whereas the attributes of man and God are essentially the same the attributes of the worker and the product are essentially different. To achieve a successful reduction of social relations to the human subject it is necessary to buttress the entire project with an undue and misplaced reliance on an idealistic conception of the relation of man to his product, a reliance which we have seen is based on an essentially false analogy adopted by, amongst others, the young Marx. Secondly, even if an original position is granted to man in the scheme of social 'evolution' it does not follow that one can continue to reduce all material and social life to the activities of an original purposive subject. The principal objection to Philosophical Anthropology concerns precisely this objective since it is through the persistence of the hegemonic role of the Philosophical Anthropology of the subject, man, that the specificity of the social relations of production and, in particular, forms of ownership is denied. The continual influence of Philosophical Anthropology, and not its original truth or generic import, prevents the proper theorisation of social relations of production and it is to this

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(6) Ranciere, J. (1971). 'The Concept of "Critique" and the Critique of Political Economy' in Theoretical Practice Vol. I. p. 42.

aspect of Philosophical Anthropology that the present critique is addressed.

It has been suggested that the concept of private property is characterised by a more or less implicit Philosophical Anthropology and that the generality of a theory of ownership, dependent upon such a concept, is unnecessarily limited and even a little distorted. But how is the concept of private property imbued with Philosophical Anthropology and why does this induce a necessary inadequacy?

As we have seen, Philosophical Anthropology inheres in the concept of private property by virtue of the existence of a subject and object of property and the definition of private property as the relation between the two of them. This relation is based ultimately on the re-ification of the essential attributes of the subject. Thus the structure of subject - predicate - object ensures the inherence of Philosophical Anthropology in the concept of private property. This can be demonstrated quite easily since positivist and common law codes each re-inforce the definition of private property as a relation between a person and a thing. The relation is sustained whether private property is defined in terms of a person's absolute power of disposal over a thing; a person's power of exclusion of others from, or a denial of their access to, a thing or, finally, as the empirical specification of unwarranted encroachments on a person's relation to a thing. Even when the relation between a person and a thing is not directly evident, as for instance in the last two, (which are often defined as relations between persons) the relation between subject and object is still implied and directly sustained in all three definitions of private property. The central terms of the definition of private property person, thing and relation are thereby established. But what is it that enables the distribution of material reality to be effected in this particular way, as between persons



and things? The answer provides us with the first of two particular dependencies of private property with respect to Philosophical Anthropology.

First of all, the definition of private property as a relation between a person and a thing can only be made on the grounds that persons and things are in fact separate.<sup>(7)</sup> Private property, therefore, presupposes the prior separation of persons and things, a separation which is supplied by, or achieved within, Philosophical Anthropology. Thus, the general separation of the subject from his essence and its relocation in an alien object, directly sustains the definition of private property as a relation between a person and a thing. Furthermore, the actual incidence of a legal intervention, which in this case takes the form of the private property relation, is a necessary consequence of the separation of material reality into persons and things, subjects and objects. On this basis alone there exists a profound continuity between Philosophical Anthropology and the concept of private property. Although if this were all that connected the two then Philosophical Anthropology would be no more than an abstract condition of defining private property in a particular way and the connection between them would be purely formal - the one acting as the premise of the other. However, private property relies on Philosophical Anthropology in a more fundamental and immediate sense.

The second concrete dependence of the concept of 'private property' on Philosophical Anthropology concerns the way in which the actual definition of private property, together with its continued exposition

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(7) See, for example, Hirst, P. (1979) op cit. on the way in which this conception of property rights implies the existence of a prior-proprietary subject.



within law, implicitly references the subject - predicate - object structure. This means that the structure of subject - predicate - object is used to establish the ensuing relation between a person and a thing as the all important aspect of private property, as its most developed and articulate form. This is achieved in the following manner: Two basic alternatives are presented to a concept of private property defined as the relation between a person and a thing. It can be argued, first of all, that the relation of persons and things establishes man's domination of the material world. Since the material world is only an extension of his subjective will, man is an absolute constitutive subject. The crucial point being that this dominance is achieved precisely because of man's privileged relation to the material world, he is related to it through the private property relation. Alternatively, the opposite position can be put forward namely that the external world of objects indexes or interpolates human beings as its agents. In this case the private property relation constitutes the essence of subjectivity and man is its (passive) object. For reasons that will become apparent both of these alternatives are not without problems. Very briefly, whilst the first collapses on the basis that it is hopelessly idealistic the second invests private property with a will of its own with the result that private property is at once the subject and the guarantor of individual rights.

Contingent upon these specific inadequacies law may attempt an escape route via the notion of the 'relation' as the fundamental concept with which to grasp private property.<sup>(8)</sup> Believing this

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(8) For example, it is often re-iterated that private property is an exclusive individual right in or to some thing and thus represents a privileged relation of the subject to a particular object or else a relation of exclusion of other, would be, proprietors.

to be a solution law merely compounds the influence of Philosophical Anthropology and, therefore, of the real locus of the inadequacy of private property, by re-ifying the attributes of man in the abstract specification of the relation of private property - the notion of property rights. At a stroke law fulfills the logic of the structure - subject - predicate - object - and thereby re-inforces, rather than escapes, the problems induced by an implicit Philosophical Anthropology.

We have seen how the theory of ownership unfolds according to the ever present reference point of private property and private property is specified on the basis of Philosophical Anthropology. The circle is complete; just as Philosophical Anthropology is inherent in the notion of private property so too is private property inherent in the theory of ownership outlined within law. It is argued here, however, that without the concept of discontinuity and the distinct forms of ownership that are demarcated it is impossible to grasp either the basis of the anti-monopoly movement - rooted as it was in a particular concept of (private) ownership - or the object of anti-monopoly hostility namely, the corporate form of structured, though fragmented, ownership. The intimate relation between the form of ownership and the analysis of anti-monopoly law cannot be theorised, specified and even spoken of within a problematic bounded by Philosophical Anthropology. This means that the construction of a general typology of ownership is logically prior to the very possibility of analysing anti-monopoly Law. In a word one can only proceed to an adequate analysis of anti-monopoly Law by reference to the way in which the various elements of ownership are articulated, one with another.

Perhaps the starting point for a more detailed analysis of the influence of Philosophical Anthropology on the theory of ownership

is to be found in Marx's critique of the Hegelian inversion of the subject and object of private property. Here, as Lucio Colletti notes, "Property ought to be a manifestation, an attribute of man, but becomes the subject; man ought to be the real subject, but becomes the property of private property".<sup>(9)</sup> Without dwelling upon whether Marx's extraction of the rational kernel (essence) of Hegel's thought can amount to an inversion of the same it is sufficient to note the unchanging position of the human subject with respect to the property right. In other words the 'inversion' neither destroys the primacy of the relation between the (human) subject and the property object nor does it, in actual terms, amount to a thorough going inversion. Since the (human) subject and the property object take on aspects of each other, the property object is invested with a will whilst the human subject takes on the character of an object. In the first case, the definition of property by reference to a subject and object and the postulation of ownership as an exclusive relation between the two is the hallmark of what has been termed the Anthropological concept of ownership. In the second case, whilst the content of subject and object are reversed - the human subject is an attribute of private property - the formal position of subject and object remain intact. The subject - predicate - object structure survives in that the specific components, supports or agents are merely reversed. Both cases meet the criteria laid down for the identification of the influence of Philosophical Anthropology and, therefore, must be rejected as inadequate to a general theory of ownership.

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(9) Colletti, L. (1975) Introduction to Marx. 'Early Writings', London, NLB Pelican, p. 37.

Developing this further, much in the way that Marx does in the Critique of Hegel's Doctrine of the State and Economic and Philosophical Manuscripts, the issue becomes much clearer. For example, in criticising the position and rationality which Hegel accords primogeniture Marx states that "Landed property thus anthropomorphises itself in the various generations. One might say that the estate always inherits the first born of the family as an attribute bound to itself.. and that this ... implies that the hereditary landowner is a serf attached to the estate and that the serfs subject to him are no more than the practical consequences of the theoretical relationship binding him to the estate".<sup>(10)</sup> At least two consequences follow on directly from this:-

1. The anthropomorphic nature of private landed property established here is the corollary not only of the subject/object inversion but also of the very idea of a unique property relation between a subject and an object - however that relation is conceived, and
2. The relegation of the landowner to a mere serf renders the cardinal distinctions between the various forms of separation from, and ownership of, the means of production impossible. Such a conception is, consequently, inadequate to an accurate specification of the relations of feudal production.

The primary question then is not whether the estate inherits the first born or vice versa, it is not the inversion of subject and object which is at stake, but the whole anthropological structure of subject - predicate - object which precludes the analysis of forms of ownership that do not reduce to subjects and confirms the drift into the anthropological problematic characteristic of the early

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(10) Marx, K. (1975). Early Writings, op cit. p. 175.



work of Marx. This can be demonstrated since Marx, despite 'correcting' the Hegelian 'inversion' falls into precisely the same trap: "The serf is an appurtenance of the land. Similarly the heir through primogeniture, the first born son, belongs to the land. It inherits him ..... But in the system of feudal landownership the lord at least appears to be king of the land. In the same way, there is still the appearance of a relationship between owner and land which is based on something more intimate than mere material wealth. The land is individualised with its lord, it acquires his status, it is baronial or ducal with him, has his privileges, his jurisdiction, his political position, etc. It appears as the inorganic body of its lord".<sup>(11)</sup> Either way the idea of a relation between (landed) private property and its (human) agent is seen as an expression of 'will' - the estates will projected anthropomorphically onto the subject or the will of the possessing individual invading the object so possessed - and the result, therefore, is the same namely, a relation between subject and object conceived on the basis of an abstract will. Furthermore, to the extent that the subject - predicate - object structure is retained then clearly ownership can only be seen as a particular manifestation of the general separation of man from his essence, as a specific incidence of the general form of abstraction/alienation.

There are, then, two distinct ways of looking at ownership within the problematic of Philosophical Anthropology, two ways which, as we have seen, already imply a third in the form of their attempted resolution. Either the human subject is tied to tangible objects even whilst dominating them, the landowner is tied to the land through

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(11) Marx, K. (1975) op cit. p. 318, additional emphasis.

the projection of his will onto it, or, the human subject is tied to the object even whilst being its subject the landowner is the willful expression of the essence of priminogeniture and the owner of private property is the mere reflex of commodity relations or trade in private property. In the last sense the real subject can, without too much trouble, be described as the commodity structure itself with the exceedingly important consequence that since the real subject is now contained within commodity relations (equivalence or, exchange according to the value form) then this subjective essence can be put forward to account for the ultimate coherence of law and the state within the economy. The subjective essence then becomes the real stalking horse of conformity, this unseen hand thus ensures that law and the state assume the 'form' of equivalence. Law and state, therefore, become but manifestations of the general separation of the subject from his essence, they are simply indices and, as such, it is not surprising that they assume the common form of equivalence. It will readily be seen that such a position has important implications for the co-incidence of the influence of Philosophical Anthropology and the specification of the relation of law and economy. These implications will be discussed in the appropriate context although it should be noted in passing that the adherence to a particular version of Philosophical Anthropology carries quite specific consequences for the reason that the influence of Philosophical Anthropology is far from uniform. However, it is quite true that both of the alternatives outlined above do retain the general relation between subject and object. Where they differ is that whilst the second position idealises private property as an essence which can then be brought into relation with itself in its manifest or phenomenal form - the human subject - the first position is simply inadequate since it cannot cope with the

complexities of ownership but only with an idealised conception of bourgeois or entrepreneurial property as the reflex of independent subjective wills.

Against the influence of Philosophical Anthropology it is possible to argue two things: First of all, private property can quite easily be described as a complex internally articulated structure of the elements of ownership, in terms of a general outline of a theory of ownership. Secondly, Philosophical Anthropology prevents the formulation of forms of ownership which bear no relation to human or any other subjects, corporate and ecclesiastical 'ownership'. An example of how Philosophical Anthropology functions as an obstacle can be seen in the way that the concept of private property is simply extended or expanded to take in the corporation as what amounts to a legal person. Hayek correctly notes this tendency: "As in the law of property the rules developed for ordinary mobile property were extended uncritically and without appropriate modifications to all sorts of new rights; thus the recognition of corporations as fictitious or legal persons has had the effect that all the rights of a natural person were automatically extended to corporations".<sup>(12)</sup> Having noted the tendency Hayek of course fails to observe that the transfer of individual rights to the corporation is simply the logical result of regarding ownership from the perspective of Philosophical Anthropology. Within a theory of ownership bounded by the concept of private property it is quite natural for the object (the corporation) to assume the essential attributes of the human subject, to become that human subject by acting as the real subject.

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(12) Hayek, F. (1949) 'Individualism and Economic Order'  
London: R.K.P. p. 116.

Needless to say it is Hayek's idealism coupled with his tendency to re-ify the concept of private property to a level of pristine purity never fully realised in any determinate relations of production which prevents him from recognising that monopoly is inherent in any free enterprise based on the sanctity of private property. As such Hayek can say nothing of the corporate form of business organisation save that it be excluded from the primarily individual rights of private property. Only two options are available for Hayek on the question of the corporation; either it is ignored, or, it is somehow forced to respect the restricted logic of private property 'proper'. The trouble with this last position is that in respecting one logic of private property is contravened another, perhaps more fundamental, form of that logic, the logic that affirms the result of free competition and private property as the existence of the monopoly form and corporate ownership. In other words the trouble with competitions is that somebody wins them.

#### Summary.

The definition of private property as a relation between a person and a thing depends upon an idealistic anthropology of the human subject as the only creator (producer) of objects, objects which can then be alienated, exchanged and legally owned. This initial dependency follows because Philosophical Anthropology provides an already separated subject and object, a prior distribution of material reality into persons and things, and a separation which allows law to account for their subsequent interrelation. Moreover, the unique relation of the subject, man, to the products he creates



in his own image, creates the conditions for both the invasion of the material world by the human subject and the equation of the subjects real essence with the object that he nevertheless creates (produces). In the first case the object collapses in on the subject, since the product is but the extrapolation of the will of the human subject, whilst in the second the object (product) becomes the real subject since it is the re-incarnation of the human essence. The tension between these alternative conceptions is only resolved at the expense of the re-ification of the private property relation itself, an over insistence on the sanctity of private property rights as the guarantor of human liberty, and the equation of rights in private property with the human essence. In this last formulation private property rights are nothing other than the essential predicates of the human subject. At once the inescapable fusion of Philosophical Anthropology and private property forged on the basis of the structure of Subject - Predicate - Object stands revealed in its fullest exposure.

#### The Corporation & Private Property.

So much for the definition of the conditions under which Philosophical Anthropology inheres in the concept of private property. What, however, are the limiting and distorting effects induced in a theory of ownership by the inherence of Philosophical Anthropology in private property? The objections to the Philosophical Anthropology of the subject, man, are simple. Any theory of ownership informed by an implicit or explicit Philosophical Anthropology must inevitably be subject to at least two substantive criticisms:- First of all, it is inadequate in the face of ownership which is not reducible to an essential subject of a given property right or object. For example, Cutler et al make the point

that religious and corporate enterprises cannot be grasped as subjects in any precise sense.<sup>(13)</sup> In this it is the problematic of the subject which prevents the proper theorisation of corporate forms of ownership and which, therefore, constitutes an obstacle to a truly general ownership. The corporation is thus not a subject. But, in equating man's essence with the products he creates, exchanges and which consequently become owned (because of the essential relation of subjectivity), Philosophical Anthropology casts the relations of ownership characteristic of the corporation in the role of gatekeepers of man's essential attributes. These relations become but different manifestations of the predicates of an essential man and the corporation itself assumes the mantle of the benign subject. Big business comes alive. Therefore, the corporation can only be viewed as a subject on the basis of an implicit Philosophical Anthropology, the corporation is regarded as an aggregate of subjective attributes. Not only is the theory of ownership, implied by the concept of private property, inadequate to specific sorts of social arrangements but it can only approach anything like an adequate portrayal of such relations by expressly including them as subjects. The only option available to law is thereby unacceptable.

To pose the corporation as a (human) subject is really nothing other than the logical extension of the inherence of Philosophical Anthropology in the concept of private property and the recognition of the central position occupied by private property within a theory of ownership unfolded under the tutelage of legal discourse. But what does it mean to specify the corporation as a subject and what

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(13) Cutler et al (1977) op cit.

implications follow on from such a specification? It need hardly be stated that any attempt to grasp the corporation within the concept of private property, through the specification of the corporation as an equivalent subject or indeed as a constellation of human attributes isolated and fixed by the concept of divisible rights in private property, is bound to be inadequate. The attempt is futile because it is impossible to describe 'possession', 'control' and 'title' by reference to a corporate subject or, for that matter, in terms of a series of human attributes parceled up within the notion of divisible rights. Furthermore, if this position is held consistently then the corporate subject ends up, in one way or another, as the modern equivalent of the entrepreneurial capitalist. In this formulation the corporation is endowed with a whole series of human attributes and motivations which enable it to be present, in person, on the political stage. Quite simply and unashamedly the corporation is equated with the human essence either as the human essence itself or as the summation of the separate attributes of the human essences. Paradoxically, this position is adopted by, amongst others, Cutler et al - who would appear to see no problem in accommodating the corporation within law providing it is seen as a legal subject - and by Frank Pearce - who sees the corporation as the purveyor of human emotions and political sensibilities, big business wanted this, achieved that and resisted the other.<sup>(14)</sup> To be sure, Cutler et al, quite clearly argue that agents should not be seen in terms of possessing universal attributes. For example, they argue that there is no reason why agents need be

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(14) See Cutler et al (1977/78) op cit. and Pearce, F. (1976) op cit.

subjects. But if legal recognition is a condition of existence of capitalist economic agents and given that this legal recognition entails the existence of subjects then the agent re-appears in the guise of a subject. There is no other option. For example, they claim that "The category of agents capable of operating as a capitalist is a function of the legal system of the social formation in question".<sup>(15)</sup> Accordingly, the category of 'capitalist agent' is inevitably clothed with the mantle of subjectivity. However, whilst the subject is a basic feature of law this does not mean that it is the guiding principle of law, nor perhaps, is it even a necessary feature of any law. Rather, the subject is inherent in this particular type of law. Likewise, whether or not the subject is constituted within the legal system in question or whether it depends upon a pre-constituted subject of commodity exchange, whilst important, is irrelevant to the presence of the subject within law and its supposed recursive effect upon the category of agents capable of being a capitalist. Of course, it has been argued here that the concept of private property and its corollary, the category of an essentialist subject, are constructed within law by means of a process which fulfills the logic of Philosophical Anthropology. But this does not alter the fact that the concept of private property does rely upon the category of the subject and that this has a significant effect upon the way in which 'capitalist agents' are perceived within law namely, in terms of subjective attributes.

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(15) Cutler, A. et al, (1977) Vol. I, op cit. p. 276.



### Concluding Remarks:-

Having established the distinctive features of the incidence of Philosophical Anthropology with respect to a theory of ownership, and especially the concept of private property, it is perhaps as well to draw them together by way of a summary. In a very basic sense the specific inadequacies encountered are but direct instances of the more general influence of Philosophical Anthropology. An example is apposite; in splitting material reality into subject and object terms Philosophical Anthropology thereby constructs the necessity of establishing some sort of relation between them; for example, the notion of essence or predicate contains exactly such a relation. The exact status of subject and object, person and thing, together with the sort of relation which holds between them, is never satisfactorily resolved within Philosophical Anthropology. Either, the relation tends to reduce to the subject - in which case the object is only the projection, or at most a locus for the absorption, of the subjective (human) will - or, conversely the subject is just an appendage of the object. Both positions are only versions of the same subject - predicate - object structure. The first, since it represents the stage whereby the predicate or subjective essence is fixed in an external object, the essence becoming transposed or translated as the object. The second, because it represents the moment at which the object, being in possession of the 'human' essence, becomes the real subject and the human subject is reduced to the status of a dependent object. Although both positions define the parameters of Philosophical Anthropology they have, as you might expect, different consequences. Whilst the first option introduces a consistent, albeit absurd, idealism the second is, at least in practice, internally incoherent

being unable to resolve the ambiguities introduced by reversing subject and object terms. It is precisely because a resolution is not forthcoming between the position, status and relation of subject and object terms that the relation itself is reified as the expression of the essential human existence; the notion of the property right is first of all detached from, and subsequently emerges independently of, the subject and object. Quite simply Philosophical Anthropology forces the displacement of subject and object terms at the same time as it preserves the idea of their relation as an ideal, all embracing concept which contains the very essence of subjectivity. The reified concept of a property right, therefore, is the logical result of the consistent application of the logic of Philosophical Anthropology and, more especially, the structure of subject — predicate — object to the theory of ownership. It follows that the abstract notion of 'rights' does not signal a fundamental departure from, or revision of, the logic of Philosophical Anthropology for the reason that rights are merely postulated on the reified trajectory of the (human) essence.

Just as the two positions which go to define the limits of Philosophical Anthropology have effects specific to them so too does this last version. In fact the extension of the logic of Philosophical Anthropology forms the groundswell for the deification of the property right as the unique form of ownership, as the form which guarantees human freedom. The way is then open for any defence of private property to be justified in the name of human liberty. All incursions on private property can be resisted, by whatever means, for the simple reason that private property contains all that is essentially human and, consequently, the very promise of human freedom. This simple equation of the human essence and the private property right, rooted of course in the theoretical structure

of Philosophical Anthropology, forms the mainspring of one of the most virulent political ideologies of our age and, as we shall see, constitutes the lynchpin of anti-monopoly politics.

It has been established that the reification entailed in the notion of private property rights abstracted from their referents does not escape the logic of Philosophical Anthropology. Quite the reverse in fact since in reifying private property rights the logic of Philosophical Anthropology is simply compounded or completed. But what practical consequences follow on from this more articulate position in terms of an analysis of the corporation? To theorise the corporation on the basis of a distinction between rights and material objects, that is, on the premise of their separation under corporate forms of ownership, is to embrace both a vicious circularity and an inescapable inadequacy vis-a-vis the corporation. This follows since rights formulated within the ambit of Philosophical Anthropology always entail subject and object terms and, therefore, they cannot be totally divorced from the (material) objects and the agents of possession to which they refer. For example, whilst it is quite true that law does isolate the attributes of property from each other, largely through the formation of the trust (Common law) or the *societas* (Roman law), it still defines private property as a relation between a (legal) person and some thing.<sup>(16)</sup> Insofar as this is the case then in separating certain of the attributes of property from each other Anglo-American Common law, for example, is doing no more than separating the attributes of the (human) subject from each other and introducing a cleavage

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(16) As we have seen this relation depends upon the fact that it contains the essence of subjectivity.

within the concept of thingness.<sup>(17)</sup> The essence of subjectivity and the essence of thingness remain intact, it is merely the rights which bring them together which are in any way fractured. This means that there are two principal ways in which the corporation can be regarded from the perspective of private property law. First of all, the corporation may be treated as if it were a giant conglomerate subject, embracing all the pertinent attributes of the individual (human) subject acting in concert as a subject. Or, secondly, the corporation may be viewed in terms of a series of relatively discrete manifestations of subjectivity which may or may not correspond to identifiable officers or shareholders of the corporation. Thus, the corporation is seen in terms of a prospectus of rights and duties. That these twin perspectives do in fact resonate within law can be demonstrated by the existence of two distinct forms of responsibility. First of all, the notion of corporate responsibility indexes the idea of a corporate subject as an appropriate locus for such responsibility. Secondly, the existence of individual liability for corporate decisions references the divisibility of the relationship of subjectivity and its distribution within the corporate hierarchy. It will be argued that neither of these formulations is any more successful than the other in accounting for the basic features of the corporation and that this flaw in the portrait of 'corporate' ownership forestalls the effective regulation of corporate affairs. Furthermore, the way in which responsibility is apportioned in different ways to different

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(17) For an elaboration on the concept of 'thingness' see Patterson, O. (1979) 'On Slavery and Slave Formations' N.L.R. 117. p. 38.



types of corporate 'subjects' will have a direct bearing upon the discussion of criminal liability and the existence of a substantive offence under the terms of the Sherman Antitrust Act. Accordingly, the equation of the human essence with the private property relation, however that equation is conceived, demonstrates the extent to which Philosophical Anthropology is a necessary support of the private property relation and, in addition, a major reason for the inability to satisfactorily accommodate corporate relations of ownership.

Finally, whilst a case can be made for the further 'influence' of Philosophical Anthropology in other spheres, this is not argued here. The role of Philosophical Anthropology is quite specific and involves no more than a way of characterising the conception and elaboration of ownership within 'law' understood in its widest sense. It is not a transcendental force which structures law, state and discourse according to its own internal predilections. It is simply a condition of regarding ownership in a particular way, a form of argument. Accordingly, the influence of Philosophical Anthropology, if influence is the right word, consists in the manner in which complex structures of ownership tend to be seen in terms of legal subjects - whether in terms of determinate human beings or juristic persons. Thus the use of the concept is no more than a convenient way of describing a particular interpretation of ownership.

CHAPTER IV

TOWARDS A TYPOLOGY OF OWNERSHIP.

Since the very issue of anti-monopoly law involves the general question of ownership and, more particularly, the specific problems associated with the corporate form of ownership, then arguably the accurate delineation of discrete types of ownership is a basic pre-requisite for an understanding of anti-trust legislation. Accordingly, this Chapter is concerned to outline the general features of four 'types' of ownership. Two of these 'types' are involved directly in providing an adequate description of the basic dispute which characterised anti-trust legislation, whilst the other two are included for reasons of 'comprehensive' coverage. The assessment of these types is not intended as an exhaustive analysis of particular types of social relations but is merely suggestive of the potential utility of the typology in describing the basis of anti-trust legislation and the further development of a general theory of ownership. This point should be emphasised for there is no way in which the sections on, for example, feudal and Soviet relations of production are intended to stand as analyses of feudalism and Soviet society respectively. They are merely intended to suggest the way in which the typology could be utilised and thus to demonstrate its potential scope and generality. This, admittedly tentative, outline is deemed necessary for the reason that a general typology is seen to be an essential prerequisite for the analysis of anti-trust legislation. Furthermore, the typology is not supposed to represent an empirical classification of discrete types of ownership but to indicate instead the more general principles which separate different forms of ownership from each other.

What then is the basic feature of this typology. The basic principle can be most easily stated in terms of what it is not. For example, just as Philosophical Anthropology makes man the principle of all theory and practice, so too does man, or the human

subject, become the principle of all ownership. The central role accorded to man in all this leads on to the more fundamental objection to Philosophical Anthropology described in Chapter III. But is it enough to object? Or, does it require a more fundamental break with the entire problematic of Philosophical Anthropology and a crucial revision of the theory of ownership? The argument presented in the previous Chapter suggests that a revision along radically different lines is important, necessary and long overdue. The remainder of this Chapter is addressed to precisely that objective. But first; it remains to draw the fundamental distinction between a theory of ownership formulated under the auspices of Philosophical Anthropology and one outlined within sociological theory. The distinction can be made by the observation that, for Sociology, it is necessary to start from a completely different premise. That premise is not the separation of the subject, man, from his essence and the range of possibilities unfolded on the basis of that separation but is instead the means whereby production is organised and controlled and the special capacities which first of all lay hold upon and subsequently set in motion the means of production. It is evident that an entirely different premise is invoked by such a theory of ownership and, it is argued, only on the basis of a truly general typology of ownership can the pitfalls and limitations of a concept of ownership hegemonised by the notion of private property and riven through with the idealism of Philosophical Anthropology be transcended.

The prime task of this section is to construct a concept of ownership which will both be adequate to the corporate form of business organisation and inclusive of bourgeois, pre-capitalist, and 'post' capitalist relations of production. Above all this involves tracing the various elements of ownership and the form of their inter-relation. Whilst the various elements are common to all four



types of ownership, their degree of isolation, independence, and development varies directly with the form of their articulation. These basic elements, however, are not intended to exhaust all human history but are merely more or less adequate to the four particular types of social relations outlined above. In other words they are not equivalent to, for example, Balibar's universal categories of production with all the 'structuralist' difficulties attendant thereon.

Chapter two set out a concept of ownership comprising three particular elements; elements which are, depending upon the form of their articulation, more or less discrete. These elements are; title, possession and control. The relation of (private) property can be defined as the interrelation of these three elements without reference to the primacy of rights and without introducing the somewhat spurious distinction between rights, subjects and objects. Instead it is the structure of their articulation which adequately accounts for the specific forms of ownership associated with private and corporate property and not the coincidence or separation of rights and material objects. It will be argued, in due course, that this separation, of subject and object, and their further co-incidence in the concept of private property, is ultimately facile. What then is the alternative composition of ownership?

The elements, or the components, which in combination define 'ownership' are as follows:-

1. Possession, the organisation of the means of production and the relative control of a distinct 'labour' process. Under certain conditions possession can loosely be equated with the technical function of management. The relation - 'ownership of/separation from' the means of production is the general relation of which 'possession' is a 'component'. For example, Cutler et al use a term

possession-in-separation which refers to the fact that managers are also separated from the means of production. This is of course true. It is necessary, however, to distinguish between the 'management' structure, which to some extent defines the relation of possession, and the position of individual managers who are separated from, and therefore cannot possess, the means of production. Possession in this sense refers to a part of the corporate entity, to the management structure or the function of (relative) control of a certain process, and not to the class location of managers. There are partial grounds for seeing, in the concept possession, an identity with the relation of real appropriation developed by Balibar. Likewise, under other social arrangements, the tenant also retains a form of actual possession because he is able to use his tenancy in a manner determined by himself. Thus the crucial element of the relationship of possession consists of the strategies and calculations which comprise the use, or actual operation of any particular 'process' of production.

2. Control, the distribution of the means of production to this or that use. Distribution entails that 'control' be used in the fullest sense of the word for it carries the more or less absolute 'power' to dispose of the means of production within the confines of capital accumulation. For example, control of the 'corporate' enterprise can be lodged at various levels - the holding company, the corporation itself, a 'parent' monopoly capital, or a minority group of shareholders (subject only to qualifications imposed by the corporate charter although in practice even these qualifications have been eroded or avoided). Wherever it is lodged it refers ultimately to the absolute power of disposal of the means of production although not to their actual expenditure, which belongs to 'possession'-in-operation. Again there are similarities between what is here called

control and what Balibar refers to as the 'property' relation. Similarly, the landlord is in a position to assign and distribute tenancies. Therefore, the manner in which this is done is a basic constituent of the relation of control.

3. Title, to benefit directly through having a title to, or a monetary claim on, the 'company' in return for surrendering money to be used as capital by the corporation. The power to use, the power to exclude others from its use, and to some extent the power to dispose of one's money-as-capital is exchanged for a title to interest. In other words title refers to beneficial ownership - which is not to say that title guarantees actual benefits, it refers to a claim not to any necessary realisation of a cash benefit. At the same time the relation of title references the fact that there is a formal guarantee that 'sovereignty' over a given 'item' will be sustained. For example, a claim by a shareholder or a derivative right to an estate and so on.

To summarise; there is the general relation of 'ownership of/separation from' the means of production; there are the components or the specifications of that relation, possession, control and title; and there is the particular mode of organisation, combination or articulation of those components or elements. It is in this last sense that private property can be defined as the specific co-incidence or relation of those elements but not as those elements themselves. Therefore, juridic relations do not reduce to economic relations since private property is a relation between these elements, and consequently, is distinct from them. Similarly, the reduction of law to economy and the ensuing charge of economism can be avoided on this basis.

One particular consequence of regarding ownership in this manner is that the problematic antithesis between public and private property

and hence the fundamental terms of the debate concerning 'Nationalised' versus 'free market' economy are altered. Instead a series of crucial concepts are introduced, the most important being the relations of ownership of the means of production, the manner of separation of direct and indirect producers from the means of production and, the form of articulation of these relations with each other. These concepts obtain whether ownership is conventionally described as public or private although the form of their interrelation may vary accordingly.

Chapter three clearly rejected the utility of a theory of private property bounded by the concepts of rights, persons and things. But if the notion of rights and, therefore, the unique relation between the subject and object of those property rights is rejected then what is the alternative? The answer is simple. First of all, there is the structure of articulation of the three basic components, a structure which modifies and regulates the special character of each component by the form of its interrelation with the others in any determinate relations of production. Secondly, there are the components or elements themselves, components which are also relations but relations between two other relations: - ownership and separation. That is to say the relation between ownership of/separation from the means of production is not a unique relation between an essential subject and object precisely because the concepts of ownership and separation refer to relations and not agents or subjects. Furthermore, since ownership is itself articulated according to three different relations then by definition these relations cannot reduce to a unique relation between a subject and an object. Rather the concept of ownership requires the construction of the respective notions of owner and thingness. As we have seen the concept of private property assumes these items as given on the



basis of an implicit Philosophical Anthropology. Therefore, Ownership and separation are relations - irrespective of the subject and object of property since they relate to or exclude each other; separation equals lack of ownership to a greater or lesser extent and Ownership equals relative lack of separation. Each relation - title, possession and control - refers to a distinct form, or relation, of ownership of/separation from the means of production and to a specific form of calculation.<sup>(1)</sup> It is manifest, then, that each relation, of which ownership in general is a reflexive outcome, does not primarily refer to a subject who owns and an object which is owned because in the first instance the form of ownership of/separation from the means of production is the crucial point, not who owns what. Of course in any particular conjuncture of the relations of production the relations of ownership/separation do refer to specific agents and determinate means of production although this is entirely different from specifying an essential subject on one side relating to an object of which it is the unique subject on the other.

Whereas Philosophical Anthropology makes man the principle of all ownership and hence man is the basis on which all relations of ownership are predicated, for sociology it can be argued that the relations of ownership refer, first and foremost, to each other, to the overall form of their articulation and, only then to the means

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(1) It has been suggested already that the idea of a relation of ownership, be it title, possession or control, is bound up with and indeed depends upon, the way in which calculations are made, calculations which, for example, secure future revenues, solve production problems, and which entail investment in particular areas. Thus the relation and the form of calculation are, in one sense at least, identical; the way in which calculations are made is both an index, and a regeneration, of the particular relation of ownership.

of production and their respective agents. In a word the relations of ownership are dependent upon the social context in which they are generated rather than upon any primarily legal conditions of existence. Thus, for sociology, corporate forms of ownership do not herald the dissolution of ownership into discrete elements independently of their general articulation since 'private property' does not simply dissolve, leaving an anarchic crystallisation of autonomous elements of ownership. The corporate form of ownership is a distinct type of ownership rather than a mutation of the private property form. To be sure, this concept of ownership (non-linear, non-uniform, non-developmental) facilitates the proper theorisation of revolutionary transformation, but not as an inevitable transfer of the means of production into the hands of the workers, but rather as a highly contingent moment bounded by the internal organisation of the form of ownership. As such the form of ownership is a crucial determinant, not an inevitable consequence, of the relations of production. This means that the relations of production occupy a central place for a theory of ownership. But these relations should be understood in the widest sense as the social relations of the re-production of material existence.

For example, the work of Henri Lefebvre suggests precisely this sort of perspective. Take, for instance, the following indication of his position:- "... the concept of 'reproduction of the relations of production' ... occupies a central position, displacing and substituting itself for certain widely held philosophical notions or scientific specialisations such as 'the subject' (whether individual or collective, cartesian or otherwise) 'the object' ('the thing', 'the sign', etc.), 'structure' and 'function' etc. It does not stand for some obscure entity such as naturalness, historicity, 'happeningness' (événementialité), spontaneity

or the unconscious; nor for some equally obscure metaphor such as 'aggregate', 'flux' or 'chain reaction'; nor for some mechanically over-precise determination such as 'device', 'mechanism', 'feedback' etc. If it (the reproduction of the relations of production) is well determined, it denotes a complex process involving contradictions, a process which not only repeats and redoubles those contradictions but also displaces, changes and enlarges them. This is the only relatively firm ground which exists; if one leaves it, one has no choice but to return to the inadequate metaphors of 'flux' etc."<sup>(2)</sup> This, together with the work of Godelier on the dissolution of the base/superstructure metaphor seen as a structured interrelation of levels and perhaps the work of Gurvitch on forms of sociality and even the writings of Elias go a long way to display the sort of intellectual heritage that sustains the present enterprise.<sup>(3)</sup>

The point should be re-iterated that this analysis is not intended as an exhaustive study of feudal and bourgeois relations of production. The only intention is to demonstrate the adequacy of what is presented as a general typology of ownership in relation to pre-corporatist relations of production and, in particular, to what remains the primary article of faith of anti-monopoly movements - 'private property'. Bearing this point in mind it is now possible to embark on such a study. The order of presentation will be sequential, feudal, bourgeois, corporate and 'soviet', but this in no way implies a linear succession of discrete modes of production,

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(2) H. Lefebvre (1976) 'The Survival of Capitalism' London: Allison & Busby, pp. 7/8.

(3) See Godelier M. (1978), op cit., Gurvitch, G. (1947) op cit and Elias, N. (1970) 'What is Sociology' London: Hutchinson.

nor a necessary path of development one to the next. Further, the mere identification of elements should not be seen as the genesis of a process which has, as its goal, either the radical separation of those same elements or any other end state, for example, an ideal or reformulated concept of bourgeois private property.<sup>(4)</sup> The mode of analysis neither implies nor admits of any necessity nor any incipient teleological progression. These caveats having been entered it is possible to address the elements and the form of ownership implied by, or contained in, feudal relations of production.

'Feudal' forms of ownership.

Even a cursory examination of the writing on 'feudalism' will reveal that some sort of juridic intervention in the economy is considered basic to the definition of feudal relations of production over and against the apparently 'economic' inclination of capitalist relations of production. Exploitation is couched within legal and political forms of 'hierarchy' when feudalism is in focus but these juridic forms are quickly jettisoned in favour of an economic analysis when capitalism comes within the sights. Accordingly, the notion of a juridic intervention seems to be a basic assumption of the literature on feudalism. But this assumption implies a prior separation between relations which can be assigned to the economic 'level' and those which belong to the juridic 'level'. So much is self evident for the relation between the two levels to be seen as an intervention of law/state or political authority with respect to the economy. The problem with this conception of law and economy

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(4) For example, both Macpherson, C. (1975) 'Capitalism and the changing concept of property' in Kamenka and Neale (1975) (ed) op cit and Tay, A. (1978) 'Law, the citizen and the State' in Kamenka & Tay (1978) (eds) op cit, talk in terms of the reformulation of the concept of private property.



as separate levels which can entertain relations with each other has been examined in Chapter two. Suffice it to say at this juncture that in 'feudalism' the juridic level is often brought in to act as a supplementary determinant, or explanation, of the silences for which the economic has no answer, for example, land tenure and ground rent.<sup>(5)</sup>

An example of just such a 'political' intervention can be detected in the work of Marx. Hindess and Hirst argue that Marx has recourse to the 'political' instances of coercion in order to account for the fact of exploitation under conditions where the direct producer is not separated from the means of production. A political/legal hierarchy is invoked to accommodate exploitation under feudal relations of production with the important corollary that exploitation is no longer defined primarily as an economic concept but is instead heralded as a political concept. It then follows that the form in which rent is paid is no longer crucial to the characterisation of the precise nature of exploitative relations since those relations are fixed by a political or legal instance and thereby remain unaffected by the form in which rent is paid. In short the relations of exploitation are directly attributed to the authority of the monarch located at the centre of a feudal retinue of lords and based on their means of political, legal and ideological co-ercion. Hindess and Hirst, take exception to the characterisation of exploitation in purely 'political' terms although they also try to steer clear of identifying the economic level in purely technical terms and of demarcating the 'political' level as a space or absence delimited and vacated by the economic. In this last respect they clearly

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(5) See Cutler, A. (1975) 'The concept of ground rent and capital in agriculture' Critique of Anthropology Vol. 4/5 (pp. 72 - 89). See also Hindess, B. & Hirst, P. (1975) op cit.

disagree with Balibar.

Although Hindess and Hirst quite correctly castigate Marx for the reliance on a 'political' explanation of exploitation under feudal relations of production it seems difficult to envisage exactly how they can avoid postulating a certain primacy of the political/legal hierarchy, albeit a political/legal hierarchy conceived as a condition of existence of feudal relations of production. And yet this is a position which they vigorously uphold and extend in a later collaborative enterprise.<sup>(6)</sup> This position is upheld notwithstanding the fact that there are considerable problems with the separation of determinate relations of production from their conditions of existence; and the separate generation of the social practices whereby those conditions of existence are achieved. Furthermore, by its very nature, this separation would tend to re-inforce the characterisation of determinate relations of production in purely economic and technical terms leaving their political and legal conditions of existence, if not out of account, at least out of the reckoning as social relations of production. This being the case, Hindess and Hirst are then in a position to argue that the political/legal conditions of existence can become primary in the characterisation of feudal relations of production. A position which they come close to arguing in the specification of title as a fundament of ownership. More consequentially the separation of law and economy implied in most analyses of feudalism mirrors the separation of subject and object achieved within Philosophical Anthropology with the result that the necessity of a legal intervention is derived in much the same way for feudalism as it is for private property. The intersection of Philosophical Anthropology and the respective

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(6) Cutler et al (1977) op cit.

positions on the law and economy relation will be outlined later. For present purposes it can be argued that the failure to explain feudal relations of production without reference to an external juridic intervention is a necessary consequence of the influence of Philosophical Anthropology on the concept of ownership. This means that the specification of two separate levels, economic and juridic, and the influence of Philosophical Anthropology on the concept of ownership are parallel and find their joint expression in, for example, accounts of feudal relations of production and, in particular, ground rent.

At first sight it seems easy enough to draw a rough parallel between the form of ownership encountered in corporate production and that present in feudal production. After all the tenant or serf does have a degree of formal possession of the means of production in the sense that he occupies, operates, and uses the means of production. As Patterson makes clear the serf is capable of being a proprietor.<sup>(7)</sup>

Furthermore, the feudal lord also embraces both title to the means of production and a kind of residual control over the distribution of the means of production. The elements are, broadly speaking, similar. The similarities, however, end there. The feudal lord retains for himself - or in some instances a delegated functionary - the direct management of the estate. Estate management, therefore, is lodged at the level of the feudal lord who thereby becomes the locus of the appropriate decision making calculus. The form of calculation remains the same, and this is the crucial point, whether the feudal lord directs in person or through a delegated functionary.

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(7) Patterson, O. (1979) Slavery in Human History, New Left Review, 117, p. 40.

Effective possession, therefore, is lodged with the feudal lord. The tenant on the other hand is, or appears to be, separated from all three forms of ownership - control, title and possession - although it is quite true that he does retain a degree of actual possession through his use of the means of production. Possession, then, is fractured as a result of the form of its interrelation with control and title. This will be discussed in more detail later. It is sufficient to note at this point that the various relations of ownership are in a distinct structure of articulation one with the other.

It is important to realise that whilst the identification of the different relations of ownership is relatively easy, the isolation of the form of their articulation is more difficult and possibly more important. To reduce one particular arrangement of the elements of ownership to another on the basis of the similar specification of the components themselves, or the formal or positional parallels in their interrelation is to commit the cardinal error of enforced historical continuity. It cannot be overstressed that the structure of articulation of the relations of ownership/separation is the distinctive feature of any set of productive relations. It follows that the proper analysis of the specificity and interrelation of the elements of ownership/separation depends upon the adequate isolation of the structure of their articulation.

Starting from the concept of the separation of the direct producer from the means of production Hindess and Hirst, argue the existence of a twofold separation:-

1. A legal separation of the direct producer from the means of production, a separation which seems to be a function of title seen as a right of exclusion, a prohibition on others from using the means of production and a condition of rent being paid at all.



2. A real separation of the direct producer from the means of production, a separation which is dependent on the form in which rent is paid. It is by means of the form which rent takes that the "... landlord is able to control the direct producers by controlling: (i) the whole economy of the land to which he has title; (ii) crucial elements of the means of production and, therefore, of the access to subsistence of the direct producer; and (iii) the reproduction of the direct producers' means of production".<sup>(8)</sup>

For Hindess and Hirst, what they term the 'legal separation' induces a first or preliminary separation between those who own land and those who require land and it is this separation which is a condition of existence of the real separation which is in turn clinched through the actual intervention of the landlord in the process of production. Title and the ability to control the distribution of tenancies and the whole economy of the estate, are lodged at the level of the landlord. The tenant, therefore, is left with the actual possession - in exchange for rent - of the means of production, with the ability to work and use them. The form in which rent is paid governs the effective separation of the direct producer from the control of the means of production taken on a whole and thereby ensures that control is lodged elsewhere.

For Hindess & Hirst, then, legal title is the first condition of the separation of direct producers from the land and it is legal title which establishes what estate management can only confirm/extend. In a very basic sense control and possession follow on from legal title, they derive from its primacy and its priority. Legal title is pre-eminent and the process of production can only establish that pre-eminence in a more sure, more involved manner.

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(8) Hindess & Hirst, (1975) op cit. p. 236.

That this position is not without its difficulties can be seen by Hindess & Hirst's equivocation on exactly this issue. On the one hand they argue: "Feudal landed property as title, as an enforced right of exclusion, is a sufficient means to bring free men under feudal exploitative relations".<sup>(9)</sup> Whilst on the other they argue as follows: "The political/legal instance is limited in its intervention to the determination and defence of property rights in land. The subsumption of the direct producer has been derived only in the first instance from the monopoly ownership of land, from the right of exclusion. Subsumption rests on economic control. Legal title does not make a landlord, and landlordship does not guarantee subsumption. We have not derived subsumption from the political/legal subordination of the direct producers to the landlord - FLP and seignorial power are not equivalents".<sup>(10)</sup> This apparent conflict can only be resolved by arguing a strict separation between feudal relations of exploitation and their conditions of existence and yet conditions of existence are by definition prior conditions of exploitation and so in one sense they do derive exploitation from legal separation. Even this limited avenue is denied them when they introduce what one suspects they supposed all along; the fact that, "It is the economic subsumption of the direct producer on which the feudal mode of production rests".<sup>(11)</sup> Thus economic subsumption appears to generate its own conditions of existence - the 'legal' separation of the direct producer from the means of production - from whence real economic subsumption is derived.

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(9) Hindess & Hirst, (1975) op cit. p. 237.

(10) ibid p. 241.

(11) ibid p. 242.

This is indeed a strange circularity which perhaps derives from their attempt to render 'legal' specificity within the confines of a mode of production, an attempt which they later yield as being misguided but rectify on the basis of an unacceptable extension of the notion of conditions of existence.

This particular way of looking at law and legal title within the parameters delimited by the notion of conditions of existence of determinate relations of production cannot account for the distinct forms of interrelation of the basic relations of ownership. It is perhaps evident that there is a contradiction between the apparent primacy of legal title as a condition of existence and the analysis of control argued by Hindess & Hirst. The analysis of control suggests that the primary feature of feudal landed property is the control of the estate. It is possible that this difficulty is a direct consequence of the inadequacy of the concept of conditions of existence. For example, we have seen that the concept of conditions of existence is inadequate to a persuasive analysis of law and economy for the reason that it relies on the abstract functionality of the conditions of existence of determinate relations of production for their concrete specification. 'They are "functional"; therefore they are', is the form of argument ultimately employed. This inadequacy is sustained in relation to the analysis of feudal relations of production; for what sense does it make to talk of a legal separation in the first place when land is ultimately held by force and it is the physical dispossession of potential tenants and the forms of their perpetual dispossession and separation which is the basis of the real separation of direct producers from the means of production.<sup>(12)</sup> In the context of a proper analysis of the

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(12) For example, See Poggi, G. (1978) 'The Development of the Modern State', London: Hutchinson, p. 30.

forms of separation of direct producers from the means of production taken together with the consequent forms of ownership of the means of production it makes little sense to talk of dispossession or separation worked out primarily as a distinctly 'legal' separation, as a separation achieved by the intervention of a legal apparatus or a separation worked out within distinctly 'legal' relations or at the level of legal discourse. On the contrary, ownership is an internally articulated concept which cannot be grasped if it is dissected according to its legal and economic aspects each seen separately and linked through the functional concept of conditions of existence.

The specific feature of the relations of feudal production is the interrelation of 'management' and control functions, the 'autonomy' or 'dependence' of the relations of possession and control. Accordingly the tenant retains the actual possession of the means of production although the particular form in which control and possession are articulated ensures that possession is effectively circumscribed through the efficient control of the estate by the landlord. In other words possession is by no means absolute but is instead limited and subordinated by its structured relationship with control.

If possession is defined as the relative control of a certain labour process then quite clearly the landlord is the agent of possession through the very notion of 'tenancy'. Therefore, it is necessary to attribute specific mechanisms to the functions of 'control' and 'possession'. For example, at the level of the assignment of the means of production to a particular use, the landlord is quite clearly in a position to control the disposition of the means of production and to some extent to control the extension of credit. Similarly, the tenant is able to determine certain aspects of the work process, method, time scale and so on. But the ability to assign the means of production is closely associated with the



effective organisation of the estate. For example, the form in which rent is paid is a crucial determinant of the ability to assign the means of production to a particular use. As Hindess and Hirst demonstrate, the payment of rent in kind, through labour expended on non-rented or demesne land, achieves two things: first, it directly relates the landlord to the process of production as the agent of co-ordination of a labour process and, secondly, through the capacity to balance the proportions of rented and non-rented land, he is able to determine the amount of labour expended in lieu of rent and, indirectly, the labour time available for rented land and the tenants conditions of subsistence. Thus the criteria used to assign the means of production crucially affect the tenants possession of the means of production; control and possession are mutually implicated. Further, since the "... landlord can control the reproduction of the direct 'producers' own units of production through the size of the units let, the form of the tenancy and the level of the rent",<sup>(13)</sup> this means that the size of units rented need not necessarily correspond to viable subsistence plots. The landlord is in a position to control the actual process of production through the supply or co-ordination of the elements of production essential for subsistence but lacking in the original rented package. Control directly impinges on, or establishes the conditions for, effective possession. Likewise the growth of tenanted units can be checked before or if those units reach a position of independence vis-a-vis the 'essential' organisational role of the landlord. The landlord is also in a position to control general requirements - water and pasture - together with large scale capital intensive projects -

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(13) Hindess & Hirst (1975) op cit. p. 239.

drainage and mills. Both of these give the landlord considerable leverage over the relative control of the production process and hence establish the basis for the effective possession of the means of production. The provision of credit by the landlord serves only to compound and extend the control exercised by the landlord in the process of production since even under the sharecropping system the landlord rather than the tenant controls the choice of crops. As Marglin notes, even nominal independence was of little value since, "Debt was not a business arrangement but subjugation".<sup>(14)</sup>

As we can see the forms of calculation associated with possession and control are distinct, as forms of calculation, and interrelated in terms of their effects. The components of ownership whilst they retain a formal or positional similarity with respect to feudal, bourgeois and corporate relations of production are effectively altered by the form of their interrelation. This would seem to indicate that the structure of articulation is the important concept with which to grasp the specificity of any form of ownership of the means of production.

As a result of the subordination of possession to control, the forms of calculation associated with possession, (management) are, in the first instance, relatively limited, referring only to minor or formal decision making process, and, in the second, hedged about by the more general calculus of the control of the estate. Thus, the decision on the assignment of the means of production to specific uses is closely associated with the decision criteria as to how the means of production should be organised. Similarly, it can be argued that under certain conditions 'title' itself is fractured

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(14) Marglin, S. (1974) 'What do Bosses Do? The Origins and Functions of Hierarchy in Capitalist Production'. Review of Radical Political Economics 1974 part II, p. 44.

since it is subject to competing determinants. This division of title between two agents in no way affects the specification of title as a component of ownership since there is no unique fusion or association of an agent with each element of ownership. The important point is that the basic elements of ownership are present under feudal relations of production and that the form of their arrangement is, as we shall see, distinct from that encountered under bourgeois and corporate relations of production. Each form of ownership can be adequately grasped through the identification of the distinct structure of articulation of the elements of title, control and possession.

#### Bourgeois forms of ownership.

'Feudal' ownership has been defined as a specific articulation of three basic relations, title, possession and control. In order to define bourgeois relations of ownership it is necessary, therefore, to describe the different articulation of the relations of ownership involved in the bourgeois form, to detail the changes in the relations themselves, and, finally, to account for the 'emergence' of a distinct type of ownership. This emergence is perhaps inevitably connected with the so called development of the factory and manufacture in general. Accordingly, an examination of the work of Marglin provides a summary which is both interesting and pertinent.

For example, Marglin argues that:

"The capitalist division of labour ... was the result of a search not for a technologically superior organisation of work, but for an organisation which guaranteed to the entrepreneur an essential role in the production process, as integrator of the separate efforts

of his workers into a marketable product".<sup>(15)</sup>

Here we have a remarkably clear statement of the re-organisation of the relations of ownership and the crystallisation of the function of management. True the problem of the self-conscious insertion of entrepreneurs into the production process remains but, nevertheless, Marglin confronts the basic question of the forms in which ownership is specified. Possession thus becomes a crucial aspect of ownership aside from its prior delimitation by control. Accordingly, the relations of laissez-faire production are laid bare. Possession of the means of production is thereby increasingly removed from the direct producers and stands more and more in a position of independence vis-a-vis the direct producers. Therefore, possession can be specified as a distinct relation predicated upon the direct management of the means of production. More than anything else then the re-location of possession away from the direct producers on one side and away from a direct implication in the forms of calculation specified by control on the other defines the essential feature of the bourgeois form of ownership. Whilst the specific relations of title, possession and control can be defined by forms of calculation which become increasingly distinct, the manner of their articulation with each other describes the space for the insertion of an entrepreneur. The entrepreneur is thus a locus for the integration of distinct relations of ownership hedged about by discrete forms of calculation. This locus is perhaps more commonly understood in terms of the relation of private property and as the basic unit of laissez-faire economics. Accordingly, Bourgeois relations of ownership may be analysed by reference to two major,

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(15) Marglin, S. (1974) op cit. p. 34.



and essentially competing, tendencies. First of all, the respective isolation of possession, title and control and their re-specification as relations. Secondly, the re-unification of the relations of ownership in accordance with 'entrepreneurial stewardship' (which amounts to the effective re-organisation of these relations).

It is not necessarily the case that each element of ownership becomes increasingly developed or complex resulting in an inevitable relation of more or less complete separation of the elements from each other and from the structure of their interrelation. This may be an outcome but it most assuredly is not a developmental process. There is no reason in principle why certain elements cannot 'regress' or remain 'undeveloped', through being subsumed under another 'dominant' relation of ownership. Another way of putting the point, is to argue as Marglin does, that technological superiority is not the criterion for innovation since innovation depends instead upon economic and social institutions and, in particular, on the control of production and the constraints imposed in turn on control. Far from being part of an inexorable progression from a lower to a higher form of production, capitalist technology is dependent upon the form of ownership of the means of production. In other words, forms of ownership are not forged in the white heat of technological change but are instead the basic parameters of technological development. Thus, the form of ownership is not an automatic reflex of the inevitable thrust of technology.

A measure of the problematic nature of transformation can be seen in the conditions of crystallisation of the relation of possession. As Marglin remarks: "Without specialisation, the capitalist had no essential role to play in the production process ..... Separating

the tasks assigned to each workman was the sole means by which the capitalist could, in the days preceeding costly machinery, ensure that he would remain essential to the production process as integrator of these separate operations into a product for which a wide market existed".<sup>(16)</sup> In other words, the effective possession of the means of production was, for certain groups of workers at least, retained by the direct producers. The relation of ownership - possession - had to both emerge, be detached from one particular arrangement of the relations of ownership, and be affirmed in a distinct relation with title and control, in order for a distinct managerial 'function' to exist. That this 'emergence' is neither a one off leap from one structure of ownership to another nor but one moment in the development of private property is demonstrated by the highly contingent character of each relation of ownership and each form of their articulation. For instance as Marglin points out: "The minute specialisation that was the hallmark of the putting-out system only wiped out one of two aspects of workers' control of production: control over the product. Control of the work process, when and how much the worker would exert himself, remained with the worker - until the coming of the factory".<sup>(17)</sup>

In short the relation of possession has no unique human subject, agent, associate or correlate. It is truly a relation of ownership seen as a structured articulation, a relation which is altered by its further interrelation with other relations of ownership. Possession refers to the relative control of a work process and as

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(16) Marglin, S. (1974) op cit. p. 38.

(17) Marglin, S. (1974) op cit. p. 44.

such, depending upon the general structure of ownership, can be lodged with the direct producer, the manager, the entrepreneur or indeed with any combination of agents, supports or human subjects. There is no one unique functionary corresponding to the relation of 'possession'. Hence there is not a qualitative leap from feudal to bourgeois to corporate relations of production based upon the insertion or demise of a human entrepreneur. There exists instead a complex process of conflict, struggle, contradiction and tension that governs the form in which ownership is at any one moment structured. It is very much this element of conflict and struggle which ensures that the mode of ownership is transformed in its very expression; the form of ownership in 'laying hold' of the means of production and setting them in motion establishes, re-establishes and transforms the balance between the constituent components of ownership. Thus possession is a particular form of the relation between direct producers and the means of production and is the outcome of struggle between various classes and fractions - direct producers and bourgeois entrepreneurs - and of the tension between the relations of ownership. Ownership, and especially the elements of control and possession, is a fundamental moment in, and of, class struggle. Marglin again puts this in particular context: "The key to the success of the factory .... was the substitution of capitalists' for workers' control of the production process; discipline and supervision could and did reduce costs without being technologically superior".<sup>(18)</sup>

Factory discipline, then, is part and parcel of the logic of possession of/separation from the means of production. Scientific management and especially Taylorism, is but the form of calculus

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(18) Marglin, S. (1974) op cit. p. 46.

associated with effective possession of the means of production and it is a central part of the extension of 'control' over the labour process through the establishment of the logic of work discipline. Identification of the relation of effective possession of the means of production and the managerial calculus that goes along with possession is by no means an admission of the validity of the managerialist thesis on the separation of ownership and control. It is perhaps as well to outline in detail the pertinent differences between this position and the thesis of managerial autonomy.

The conventional response to the managerialist thesis argues that whilst, under a certain arrangement of the relations of production managers are a professional salaried stratum, their economic and business calculations are, nevertheless, informed by the logic of capital accumulation and profit rather than by a unique constellation of managerial goals. For example, optimising or satisfying are often quoted as surrogate objectives pursued by management even when in direct contravention of the logic of profit maximisation. But the real question is not primarily whether managers follow capitalist logic - (a logic which ultimately can induce a certain conformity) - but rather involves the status of the decisions which managers are called upon to make. Whilst it is quite true that managers may have an important autonomy vis-a-vis control and title and, given that this autonomy is based on the different form of calculation which structures possession independently of title and control, this autonomy only applies to a restricted area of decision making and a specific form or means of calculation. Of course, the degree of autonomy will depend upon the overall articulation of the relations of ownership and, therefore, will vary



as between 'bourgeois' and 'corporate' relations of ownership. The important point, however, is that the status of managerial decisions cannot be reduced to that of decisions affecting control. If that were the case then managers would have a crucial autonomy vis-a-vis other agents of ownership. Nor can management be reduced to the aims of capital accumulation and profit since managers are then seen as more or less automatic reflexes of the abstract logic of capitalism and are denied their specific role in the relative control of the labour process. Broadly speaking the first position is argued by managerialism and the second by its opponents. What is common to both positions is that each, in its own way, denies the existence of the relation of possession and, ironically, the existence of a specific managerial structure governing the possession of the means of production. Possession vanishes into the more general logic of control and, therefore, managerialists and anti-managerialists cannot be distinguished on this basis.<sup>(19)</sup> On the contrary, managers are no more, no less, than a group of supports for specific forms of calculation implied in the concept of possession of the means of production. They can no more be transposed into a position of absolute control than they can be seen as the incarnation of the spirit of capital accumulation and the profit motive. Both positions fail to realise the essential specificity of the relations involved, particularly the relation of possession, and, therefore, the manner in which they are subject to quite definite rather than general interconnections.

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(19) Take for example Ralph Miliband who, broadly speaking, is an opponent of managerialism. He argues that 'possession' and 'control' are but different strategies within an overall 'capitalist' consensus. Miliband, R. (1973) 'The State in Capitalist Society', London: Quartet, p. 34.

This would mean, therefore, that 'possession' emerges as a discrete form of calculation within bourgeois relations of ownership and may or may not describe an entrepreneurial or a delegated capacity. Whether or not the individual capitalist exercises this capacity or puts it out to a specialised functionary, the logic of possession is established as is the particular articulation of possession, title and control around the personage of the entrepreneurial locus. Accordingly, the relation of possession varies in terms of the more general organisation of ownership and in particular depends upon the type of ownership in question.

We have established that technological change is bound by the particular form of the organisation of the means of production specifically, by the intervention of management with respect to the possession of the means of production and by the forms of calculation, supervision and discipline associated with the logic of possession, the form of ownership delimits the deployment of technology. Or to quote Marglin "... the primary determinant of basic choices with respect to the organisation of production has not been technology - exogenous and inexorable - but the exercise of power-endogenous and resistible".(20)

Thus, Bourgeois forms of ownership can be analysed according to two competing tendencies:-

1. The respecification of the relations of ownership and, in particular, the reformulation of the relation of possession based for the first time on a relation of its relative independence vis-a-vis control; and

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(20) Marglin, S. (1974) op cit. p. 60.

2. the consequent location of a place for the entrepreneurial agent as the locus for the intersection of the various relations of ownership.

As we have seen a particular feature of bourgeois relations of ownership is represented by the advent of scientific management. For example, Taylorism, registered, above all else, the articulation of forms of calculation which could ensure that 'possession' of the means of production was finally and completely removed from the direct producer and secreted in a management structure delimited and sustained by forms of calculation and control. In this sense Sohn-Rethel remarks on Taylor's "... singleness of purpose in wanting to transfer the whole skill and experience possessed by the craftsmen of metal trades upon the management ... (skill and experience) ... thereby became a possession of the managers to deal with in the interests of capital; they could carve it up, mechanise the subdivisions and even automate it as a whole".<sup>(21)</sup> Thus the separation of the knowledge from the direct producer constituted a basic condition for the effective possession of the means of production by the managerial structure. It was only on the basis of this prior separation that management gained the means to wield technological coercion on the workers through their control of 'the important decisions and planning which vitally affect the plant'. In effect Taylorism 'delivered' the means whereby management could 'possess' the means of production. Although Sohn-Rethel makes a critical error in arguing that scientific management was necessary to ensure the control of capital over production since

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(21) Sohn-Rethel, A. (1978); 'Intellectual & Manual Labour', London: Macmillan, p. 153.

he implies that 'possession' is only a means for exercising control rather than a distinct relation of ownership. He appears to miss the point that scientific management represents a level of decision making and a form of calculus quite distinct from the criteria which in form and delimit the decision making concerning capital transfer. As we have seen, decision criteria of 'possession' are quite distinct from criteria associated with the 'control' of the means of production. Scientific management and possession do not just follow on from, or subordinate themselves to, the establishment of economic control. Possession is neither the 'form' of control nor is it the functional means for the exercise of control. Whilst it is true that control and possession are mutually implicated in an overall articulation of ownership they do not reduce to or collapse into each other. In the end the pitfalls of such a reduction can only serve to replicate the exceedingly tortuous reiteration of managerialism and anti-managerialism.

It will no doubt be apparent that when scientific management is considered it is as an index of the theoretical articulation of a movement that took place in the interstices of bourgeois and corporate forms of ownership. Possession, as a form of calculation and criterion of ownership, first 'emerged' within bourgeois forms of ownership only to be developed more completely under corporate forms of ownership. Scientific management is perhaps properly located as a fundamental thrust of transformation as between bourgeois and corporate forms of ownership. Or, to put it more briefly, scientific management overlaps, or is mapped onto both bourgeois and corporate forms of ownership and it is so mapped precisely because of its intimate relation with possession, a relation which first 'emerges' within bourgeois forms of ownership.



## Corporate relations of ownership.

Much has been written on the 'corporation' since the classic work of Berle & Means, 'The modern corporation and private property'.<sup>(22)</sup> Although a lot has been written on the subject the discussion has been characterised, on the whole, by an obsession with three basic themes. First of all, the argument, highlighted by Berle & Means in 1932, that Capitalism has been attenuated by the separation of ownership and control has become the centrepiece of any discussion of the nature of 'managerial Capitalism'. For the most part this discussion rests upon the identification of distinct managerial goals. Proponents of 'managerialism' maintain that such goals are socially responsible and the corporation is even regarded by some as basically 'soulfull'. The important point for this perspective is that managers do not, necessarily, reflect the requirements of profit maximisation and 'finance' Capitalism and hence modern industrial society is not, essentially, a capitalist social structure. The dispersal of stock ensures that benefits are widely and generously distributed and the crystallisation of managerial goals represents the 'social' and responsible character of the corporation. On the other hand, opponents of managerialism argue two things. First, that even if distinct managerial goals exist they are effectively overruled by the basic requirements of finance capital which are realised through a system of interlocking directorates. Managers are thus 'forced' to comply with the logic of capital accumulation. Secondly, it is often argued that the separation of ownership and control is overdrawn

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(22) Berle, A. & Means, G. (1932) 'The Modern Corporation and Private Property' New York: Harcourt Bruce.

and that managers may 'own' a significant amount of stock and in any case manage in the basic interests of capital accumulation. Thus managerial goals are 'seen to co-incide with those of profit maximisation. This argument has been examined in some detail already. Accordingly, it need only be re-iterated here that both of these perspectives on 'managerialism' reduce, quite inevitably, to a series of sterile platitudes. The discussion degenerates thus largely because of the incomplete picture of the nature of 'ownership' and 'control' which remains, after all, the lynchpin of the entire dispute.

A second view of the corporation involves the way in which the social and economic functions of the concept of private property have apparently changed in such a way as to facilitate, rather than hinder, the growth of the corporate empire. Committed, more or less, to an instrumentalist conception of 'law' this position starts off from a particular conception of private property and then seeks to describe the use of the private property form by the corporation. For example, this sort of perspective is implicit in the work of Berle and Means and is made quite explicit in a revised introduction by Berle. He argues that "Increased size and domination of the American corporation has automatically split the package of rights and privileges comprising the old conception of property. Specifically, it splits the personality of the individual beneficial owner away from the enterprise manager".<sup>(23)</sup> Thus, whilst Berle correctly notes part of the tendency namely, the separation of beneficial ownership of rights to a share in corporate profits from

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(23) Berle & Means (1967) "The Modern Corporation and Private Property", New York: Harcourt, Bruce. p. (XIX).

the (managerial) ability to determine how those profits are generated, the separation takes place on the basis of the private property form. Accordingly, whilst the corporate assets 'belong' to the corporation as a legal entity, the beneficial enjoyment of revenue generated in consequence of those assets is seen as a personal right charged upon the corporation. The corporation is fixed in terms of a package of subjective attributes determined by the basic structure of the concept of private property. The legal concept of private property remains intact but its constituent parts are allocated to several different actors. Above all else this represents the quite widespread conviction that the basic structure of law and especially private property are unaltered whilst its social function is fundamentally transformed. This sort of perspective has been examined already in the form of a critique of Karl Renner but perhaps it should be emphasised that this particular perspective is an extremely important determinant of the nature and evident failure of anti-trust legislation.

Finally, there is a more or less consistent attempt to view the corporation as an agency, an actor, or a locus of decision making seen in its own right. To be sure there is a great deal of variation in the way in which the corporation is portrayed. For example, the corporation may appear as the incarnation of big business or monopoly capital or, perhaps more modestly, the actual corporate enterprise may be seen as an enterprise subject or agent endowed with the capacity to control, organise and distribute the industrial product. Although as John Scott makes clear of Cutler et al's notion of the enterprise unit as a locus of decision making calculus they .. "fail to realise .. that effective possession may rest with any actor, individual or collective, and that the

enterprise is not necessarily the only collective actor capable of effective possession".<sup>(24)</sup> Needless to say, Scott's concept of social actor is perhaps unnecessarily restrictive and is also subject to precisely the same sorts of criticisms levelled at the concept of an enterprise agent namely, that it dissolves all too readily into some form of surrogate subjectivity. To be fair, Cutler et al, do realise that the equivalent of 'effective possession' may reside with any 'actor' since they see the category of agents capable of 'possession' as a function of the legal system in question. Thus the legal system sets up particular agents of (economic ) possession which may vary as between legal systems. Nonetheless, the criticism of the general privilege accorded to the enterprise unit or agent is well made. Similarly, the concentration of 'corporate' power within a few major corporations has generated the idea of what Holland calls a 'meso-economic sector'.<sup>(25)</sup> This sector of the economy thus becomes the all important 'actor' in society, a kind of ultra big big business or the essential form, logic or core of monopoly capital. Accordingly, this sector controls the commanding heights of big business and multinational corporations. There again Perlo argues that there are strong ties, cemented by interlocking directorates, which link financial institutions in an inner circle of co-ordinated power.<sup>(26)</sup> But the very notion of interlocking

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(24) Scott, J. (1979) 'Corporations, Classes & Capitalism', London: Hutchinson, p. 34.

(25) Holland, S. (1975) 'The Socialist Challenge', London: Quartet.

(26) Perlo, V. (1957) 'The Empire of High Finance', New York: International Publishers.



directorates assumes that the interlock has a centre, a single locus which provides the basis for the co-ordination of industrial affairs, and political and social affairs. Furthermore, Galbraith's concept of the technostructure assumes that there is a predominant feature of the corporate structure which provides the core of the economy and industrial society generally.<sup>(27)</sup> The idea that there is a single centre of industrial society, a determinative principle (Hirst), is subject to quite specific criticisms not least because it reduces all forms of sociality, however discrete, to one fundamental essence. But there is a more compelling reason for rejecting this position as a proper conceptualisation of corporate affairs. By its very nature the corporate form of ownership is characterised by a radical disjunction between its composite relations and any connections are quite specific and contingent. To the extent that these portraits of the 'corporate' economy attribute a central importance to the corporation as the predominant actor in industrial society or else isolate one single set of social relations as the primary determinant of industrial organisation then they each misunderstand the basic structure of the corporation. For example, even Stone argues that the corporations are the important actors in modern society.<sup>(28)</sup> To be sure, there are considerable differences between the respective adherents, which is not surprising since there is a long tradition which sustains this particular perspective. Indeed many of these bear a more than passing resemblance to the pioneering work of C. Wright Mills.<sup>(29)</sup> Nevertheless, insofar as they share the idea that

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(27) Galbraith, J. (1967) 'The New Industrial State' London: Hamish Hamilton.

(28) Stone, C. (1975) op cit.

(29) Wright Mills, C. (1956) 'The Power Elite' New York: Oxford University Press.

there is some form of coherence to corporate relations and that these relations are constituted around a centre, an essential social actor (the power elite, big business, monopoly capital, the meso-economic structure, the technostructure, the corporate essence, the technological imperative and so on) then they are less than adequate representations of corporate relations.

Over and against those perspectives which attribute a pertinent effectivity, even an anthropomorphic nature, to the corporation it is argued here that the corporation is best understood as a distinct articulation of social relations of ownership. The basic structure of these relations has been described already. Under the 'corporate form', however, they are organised on a radically different basis and their content as social relations is altered quite significantly.

How then shall we define these relations? The concept of 'control' is a difficult one and it has proved virtually impossible to sustain any agreement over what it means. For example, Scott refers to 'strategic control' as the basic parameters within which corporations act whereas Berle & Means see control as the power to determine the composition of the board of directors and as such it can be vested in a variety of sources, the 'formal' owners, the effective majority or minority of shareholders, management or, finally, the apex of a pyramid of interlocking corporations. Similarly, the concept of control is often used to refer to the power to determine a quite general set of policy objectives, Parmelee, Goldsmith & Larner.<sup>(30)</sup> Also, there is a more or less

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(30) See Goldsmith, R. & Parmelee, R. (1940) 'The Distribution of Ownership in the 200 largest Nonfinancial Corporation' Monograph of T.N.E.C., 29, Washington: Government Printing Office, and Larner, R. (1970) 'Management Control and the Large Corporation', New York: Dunellen.

consistent attempt to draw a cleavage between 'strategy' and 'operations' as distinct types of decision making, De Vroey & Eisenberg.<sup>(31)</sup> Accordingly, the discussion of 'control' is characterised by incomprehension and even incommensurability. Whatever the particular merits of these perspectives there is a general failure to realise that control is essentially a social relation of ownership. Therefore, control is often juxtaposed to ownership in the famous dispute relating to the separation of ownership and control. Likewise Scott, following Giddens & Clement, argues that strategic control is mediated through legal institutions and relations.<sup>(32)</sup> And control is even seen as a form or a potential which is inherent in other social relations, possession or ownership. For example, Scott & Berle & Means adopt this view.<sup>(33)</sup>

Over and against this sort of interpretation, it is argued that control is not just a sphere or type of decision making since decisions invariably result in the making, breaking and re-organisation of social relations (debtor, creditor, severance, supervision, sub-contracting, redeployment and so on). Therefore, control is a social relation which interconnects definite aspects of the social process of production. Accordingly, control is a genuine relation which brings

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(31) See De Vroey, M. (1975) 'The Separation of Ownership and Control in Large Corporations' Review of Radical Political Economics, 7/2 and Eisenberg, M. (1969) 'The Legal Roles of Shareholder and Management in Modern Corporate Decision making', California Law Review, 57/1.

(32) See Giddens, A. (1973) 'The Class Structure of Advanced Societies', London: Hutchinson and Clement, W. (1975) 'The Canadian Corporate Elite', Toronto: McClelland.

(33) Scott, J. (1979) op cit. and Berle, A. & Means, G. (1967) op cit.

together resources and uses. To some extent it involves what Poulantzas describes as the ability to assign the means of production to a particular use. For 'corporate ownership' control is constituted through a definite form of calculus which equates diverse factors in a sum which reaches far beyond any unique constellation of boardroom personnel and the corporate entity. For example, the decision to invest or conversely not to invest in a particular product or geographical site carries with it the inevitable restructuring of social relations in no way 'formally' connected with the identifiable corporation with which we are initially concerned. Control is thus much more than control of the corporation or even the corporate empire since it involves a whole range of factors which affect other social processes. We are not so much concerned with which group has control as with how control is executed. That is to say with the way in which decisions are made, the calculations which inform them and their status vis-a-vis other sorts of decisions. Accordingly, whether or not control is by a majority or minority of shareholders or whether a corporation is controlled by management is considerably less important than the social relation of control itself, its scope and its content. Similarly, for Scott to argue that there is a transition from personal to impersonal forms of possession and control tells us next to nothing about the social relations of possession and control. To be fair he does draw a distinction between the modes of control, which appear to designate the author of control (minority, majority, management and constellation of interests), and, the mechanisms of control, which describe how control is executed. But it is arguable that the distinction is untenable for there is a very real sense in which the way control is exercised is the proper locus of control, it is the very calculations which inform 'strategic' decisions that are at the heart of control.



Who is in control is at best an interesting irrelevance.

Insofar as 'corporate' control is concerned we are talking then in terms of the criteria by which calculations are made concerning the choice of locations and products for investment, the division of the overall profit and the general objectives concerning the labour force, finance, etc. It involves what Aglietta terms the creation of a head office as an agency of co-ordination.<sup>(34)</sup> Likewise, possession is the social relation of direction and 'use' of a determinate process of production involving a complex series of calculations and strategies designed to get production moving. Once production is in motion the relation of possession is necessary to keep it moving. As such it includes all forms of direction of the 'labour' process whether it be through strategies of work study, worker representation/control or by more centralised plant 'management'. Similarly, the 'level' to which possession refers may be that of the enterprise unit, the single production unit (Poulantzas), the factory, the functional department, or a centre of profit (Aglietta), depending upon the exact form of industrial organisation in question and whether it is more conglomerate than corporate.<sup>(35)</sup>

Title, refers basically to the system of transfers of assets. Thus the forms of calculation which govern the circulation of capital, stocks, shares, etc. comprise an essential relation of ownership. Insurance companies, stock market expectations, the 'world' market, scale of returns and so on, are each important elements in determining

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(34) Aglietta, M. (1979) 'A Theory of Capitalist Regulation: The U.S. Experience', London: NLB.

(35) Poulantzas (1973) op cit. and Aglietta ibid.

the transfer of liquid assets between enterprises. As a legal entity the corporation has the formal legal ownership of its assets; it is a legal agent.<sup>(35a)</sup> In return investors and stockholders receive a right to a portion of some of the benefits which may accrue to the corporation. But the relation of title is much more than the fragmentation of private property and the distribution of rights to individual investors and to corporations respectively. As a relation of ownership, title is governed by the logic and the forms of calculation which assign and re-cycle the market for assets. This form of calculation is distinct from the sorts of calculations which comprise possession and ownership. Although it is true to say that they are interrelated in specific ways. For example, the so called 'power' of large institutions or investors to buy and sell stock makes itself felt as a factor of calculation by management but not as a hydraulic force impinging upon the corporation. What is important is that the issue of legal 'ownership' and legal rights is bound up with the system of transfers of this particular nature. Law is not just a condition of transfer, nor is it something which facilitates the exchange. The very notion of legal title is bound up with the relation of ownership which we call 'title'. In one sense at least law is the system of transfer. Conversely, 'title' is not exhausted by its legal constitution since the very notion of a relation of ownership requires the operation of a distinct form of calculus part of which involves the (legal) transfer and division of rights and so on.

In a very basic sense these three relations of ownership are characteristic of the corporate 'economy'. But the way in which they are interrelated may vary considerably. For example, both Poulantzas and Aglietta have noted shifts in the structure of

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(35a) By definition, the corporation is a legal entity distinct from its members which may own its own property. The shareholders merely 'own' titles to interest but not the company per se. See Hadden, T. (1977) op cit, 'Penningtons Company Law' (1973) London: Butterworths and Kelsen, H. (1945) op cit.

corporations.<sup>(36)</sup> For Poulantzas, the conglomerate form of business has demonstrated a partial re-integration of 'separate' sub-corporations in a more centralised unit of control. Whereas Aglietta detects a shift away from functional sub-departments toward more regionally autonomous centres of profit; they both detect different trends but the main point is that the relations of ownership are inherently relations of tension. Thus the forms of calculation characteristic of the particular relations, as well as their overall configuration, are perpetually shifting. There is a persistent tension between the calculations which inform decisions concerning the transfer of assets and those which determine 'control' and 'possession' respectively.

#### Soviet relations of ownership.

In terms of the general typology, Soviet relations of ownership can best be described through a consideration of the work of Charles Bettelheim as expressed in, for example, "The transition to Socialist Economy" and "Economic calculation and forms of property".<sup>(37)</sup> Here the author takes great pains to consider the construction and location of what he calls the enterprise or economic subject. In the process, Bettelheim confronts the nature of state 'property' and forms of 'legal' ownership in a manner which is not without its problems. Indeed, Ralph Miliband makes a forceful criticism of the

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(36) Poulantzas (1975) and Aglietta (1979) op cit.

(37) Bettelheim, C. (1978) 'The Transition to Socialist Economy', Brighton: Harvester, and Bettelheim, C. (1976) 'Economic Calculation and forms of Property', London: R.K.P.

consequences of Bettelheim's formulation of economic agents as class relations. These features will be outlined in due course. At the moment though it is necessary to set out the specific continuities between a general typology of ownership and the work of Bettelheim insofar as it instances one aspect of the more general examination of Soviet relations of production.

At an entirely formal level, it is perfectly possible to assign the relations of ownership to positions within Soviet relations of production. Quite simply then; title, through the concept of state property, would seem to reside with the 'state'; control too, in the form of economic objectives and resources allocation, is secreted within the 'state' structure and, possession is located at the level of the individual enterprise or unit of production. So far so good. Now the criteria for allocating funds to the enterprise as a whole are effectively dissolved (as independent forms of calculation) on the basis that there can be no external (independent) finance, no elaborate calculation of investment decisions based on revenue, and no independent .. 'rentier' calculus. These calculations are subsumed instead under decisions regarding internal resource allocation, at the level of the economic plan regarding production priorities. Accordingly, the calculations associated with control and title are mutually implicated under Soviet relations of ownership with the very important corollary that title is but a formal relation of ownership rather than a fully articulated form of calculation. Title is emptied of all but its formal status as a relation of ownership. Thus the abolition of legal title appears to exhaust the commitment to the abolition of private property. But as Bettelheim is at pains to point out "... exploitation can be undertaken as much by those who intervene



as 'possessors' of the means of production (the managers of the enterprises), as by those who are supposed to 'control' them in the name of state property".<sup>(38)</sup>

It can readily be concluded, then, that the crucial aspect of ownership emerges in the interrelation of possession and control. These twin relations of ownership become the axes around which competing definitions of class or classless society seem to revolve. This means that the debate concerning the exact nature of Soviet relations of production - whether they are state Capitalist, intermediary or even Capitalist - is often located with respect to whether or not there is a state bourgeoisie controlling the calculations affecting resource allocation and investment decision making, and the class location of the agents who 'possess' the means of production or the enterprise units. Although it can be argued that it is the relations of possession and control which are crucial to an analysis of the structure of ownership under Soviet relations of production and, consequently, to an analysis of the exact nature of Soviet society. Whether Soviet society is defined as classless depends in an important sense upon the form in which the relations of ownership constitute the ownership of/separation from the means of reproduction of material existence. The form of ownership is indeed fundamental to a discussion of any 'society'.

As an example of the analysis of Soviet relations let us turn then to the work of Bettelheim. Bettelheim quite **correctly** argues that, "In the majority of the 'socialist countries' possession of the means of production reverts to the enterprises".<sup>(39)</sup> Possession is

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(38) Bettelheim, C. (1976) op cit. p. 93.

(39) Bettelheim, C. (1976) op cit. p. 82.

defined here as the ability to control and put in to operation a determinate process of appropriation of nature (real appropriation). So much is in accord with the position unfolded within a general typology of ownership. Where Bettelheim diverges is on the question of the enterprise subject. He argues that "When this possession is consolidated by corresponding legal relations, the enterprise is established as a 'legal subject' ... (and that) .. consequently, this possession tends to assume the legal aspects of property".<sup>(40)</sup>

There are several points of interest here. Not only does Bettelheim assume a prior distinction between economic and legal relations, together with the contingent formulation of the enterprise as a legal subject, but he also seems to conflate the categories of effective possession and the relation of legal title in the unitary relation of private property. At least two possible explanations are available for this. Either, Bettelheim is referring to the remnants of a bourgeois legal form active in constituting the enterprise as a legal subject in post-revolutionary society; or, this conceptualisation of the relations of transitional society is inescapably trapped within the parameters of an implicit Philosophical Anthropology. To be sure the incidence of Philosophical Anthropology is evident in both cases although it must be said that the particular effects of Philosophical Anthropology differ substantially for each.

For example, the theory of non-correspondence of certain economic relations with legal relations and the non-coincidence of economic and juridic subjects is at the heart of Bettelheim's dilemma on precisely this issue. For to admit of the former is to argue at least two things. First of all, a purely technicist conception

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(40) Bettelheim, C. (1976) op cit. p. 82.

of the relations of production and, secondly, the separation of legal and economic relations in order for one to lag behind or, fail to correspond with, the other. Now such a structure of argument is akin to that characteristic of Philosophical Anthropology. A much closer affinity between Philosophical Anthropology and the particular work of Bettelheim can be traced through the concept of economic and juridic subjects each seen as separate forms of subjectivity. As Bettelheim recognises; "In fact, when rights of disposal and control are institutionalised in favour of a limited group of producers (....) such rights can give rise to the equivalent of a kind of ownership by this limited group, even though, in theory, the means of production over which these rights are exercised are public property".<sup>(41)</sup> Bettelheim merely confirms this ambiguity when he goes on to discuss the circumstances under which a 'juridical personality' is conferred on an economic subject.<sup>(42)</sup> It has been forcefully argued elsewhere that the concept of the subject is basic to Philosophical Anthropology and, therefore, is inherent in the form of ownership demarcated by the concept of private property. In this way the concept of the subject and private property provide for continuity between economic and juridic subjects. So much so that to even speak of economic and juridic subjects is at best a misnomer. This follows for the reason that the very existence of an economic subject necessarily connotes the concept of a juridic subject since they are but two expressions of the same subjective essence formulated under the auspices of Philosophical Anthropology. It should by now be self

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(41) Bettelheim, C. (1978) op cit. p. 54.

(42) For example, see ibid. p. 74.

evident that the question of the co-incidence or divergence, of economic and legal entities conceived as subjects is a false question since the use of the concept of subject ensures an immediate affinity between the legal and the economic. Moreover, it is a 'false' question inscribed within very definite parameters.

The specification of economic subjects in the work of Bettelheim, taken together with the notion of an enterprise subject in Cutler et al, each, in their own way, betray the reliance on an implicit Philosophical Anthropology. The consequence of this is the inscription of a whole series of essentially false problems on the agenda. For example, the question of the lag of legal behind economic relations or the problem of whether an effective possession be defined as a private property right at the very least are inappropriate questions. For this perspective all questions of the respective correspondence of law and economy ultimately reduce to the specification of the conditions under which one mode of discourse is translated into another; 'economic' into 'legal' and vice versa. It follows inexorably from this that for Bettelheim & Cutler et al the crucial issue is not whether enterprise subjects can be inserted within legal forms and accorded a distinct legal status because the formulation of the enterprise, and the economic 'sphere' in general, in terms of 'subjects' ensures the coincidence of economic relations with the categories of legal discourse. It is not so much that the relations of ownership are analysed according to the existence of economic and legal realms (such that the coincidence of one with the other can become crucial) it is rather that once economic or enterprise subjects are introduced then this immediately indicates that relations of production can be specified in terms of legal discourse. However, the existence of economic and legal discourse sustains the prior division of material reality into economic and legal realms.



This means that to argue a relation between law and economy is to do no more than imply that the concepts of one can be translated into the other more or less without residue. It is argued here that, however the law/economy relation is conceived the category of the subject or enterprise agent ultimately allows for the effective translation of one form of discourse into another. Furthermore, once the problem is seen in terms of the relation between law and economy then the concept of the subject provides the only basis upon which law and economy can be consistently related.

In order to comprehend the precise source of the difficulties encountered by Bettelheim's analysis of Soviet relations of ownership it is necessary to re-examine the way in which law and economy are supposed to cohabit. In particular, it is vital that the work of Pashukanis, concerning the interrelation of law and economy, be re-opened to allow the appropriate parallels to be drawn between the role of the legal subject and the manner in which law and economy are held to interrelate.

To look at the structure of the argument in rather more detail, paying particular regard to the more general implications that follow on from it, the argument is as follows. As soon as the issue is seen in terms of a relation between Law and Economy then this immediately implies the prior existence of law and economy as separate ontological realms. That is to say the manner in which the question is posed implies the distinct ontological status of Law and Economy. Now the form in which the law/economy relation is specified, the manner in which the question is 'apparently' solved, implies the existence of discrete epistemological terrains linked by the translation of the terms of one into the terms of the other. For example, the work of Pashukanis commences on the basis of a formal analogy between an examination of the commodity

in Marx's Capital and the examination of the form of Law. The question is at first purely conceptual - whether the structure of commodity exchange can be accommodated within legal discourse. The problem is 'solved' on the basis of the translation of the form of argument used in 'Capital' to the categories of legal discourse. The difficulties encountered in effecting a perfect translation lead to the specification of legal relations as an independent ontological category necessary for the exchange of commodities, as a condition of existence of determinate relations of commodity production. It is on this point that we can see a reason for the ambiguous formulation of law within the work of Pashukanis as both the form of equivalent exchange and its material condition of existence. Quite simply Pashukanis shifts ground, from the question of formal parallels between forms of discourse to the specification of legal relations as concrete conditions of existence for economic relations. In a word the form in which the solution is posed - the conceptual parallels between forms of discourse - reverts to the simple reiteration of the manner in which the question is posed - the discrete ontological status of law. Pashukanis conflates the solution with the question for the reason that the manner in which the question is posed renders it unanswerable. Indeed once the problem is posed in this way, as an ontological separation of law and economy, then there is only one consistent solution. That solution is arrived at with reference to the basic parameters of Philosophical Anthropology. The solution to the problem of the law/economy relation is thus because it provides the only means whereby the concepts relating to law and those relating to economy can be subsumed within a larger domain. Namely, the category of the subject, a category which ensures that the economic and juridic spheres are part and parcel of the overall affinity

of the subjective essence. Law and economy - whether conceived as epistemological or ontological domains - are but different manifestations of the same subjective essence. Philosophical Anthropology thereby provides a solution, but it is a solution obtained at an unacceptable price - the reduction of all forms of ownership to the relation of private property conceived, of course, on the basis of an essential subject. Quite paradoxically then in attempting to transcend the base-superstructure metaphor and to provide a solution to the law and economy relation Pashukanis ends up by embracing the only possible solution once the problem is posed in this particular way - namely as a relation of Law and Economy. For Pashukanis that solution is ultimately the fact that the form of law is interdependent with the form of commodity exchange for the reason that both are instances of the same division of the human subject from his essence achieved within Philosophical Anthropology. The concept of equivalence can then be interpreted as the hidden hand that ultimately induces conformity between the economic and legal spheres, as a common essence which ensures that apparently discrete phenomena are but different manifestations of the same essential structure. It has been a persistent theme within the thesis that the entire notion of the Law/Economy relation must be rejected, for reasons already adequately recounted, and a more efficient premise adopted. It is argued that the concept of ownership of/separation from the means of reproduction of material existence provides such a premise.

This necessary diversion concerning the law/economy relation completed, a diversion so crucial insofar as an accurate assessment of Bettelheim is concerned, it would be expedient to return to the more substantive work of Bettelheim. Work which unfolds on the basis of the more general concerns hitherto recounted. Perhaps the



point should be made that the relation between Philosophical Anthropology, on the one hand, and the law/economy relation, on the other, is far from exhausted by this brief diversion. Indeed their interrelation will be re-examined at a later juncture.

To return then to Bettelheim's work on Soviet society by way of the criticism of his work by Ralph Miliband. Miliband, correctly notices the tendency within the work of Bettelheim to derive class relations from the relations of ownership in a manner which affords the subsequent necessity of bringing in purely subjective criteria to determine class membership in Soviet society. For instance, Miliband remarks of Bettelheim "What he seems to be suggesting is that, where there exists a division of labour according to which some people, located in the state or party apparatus, exercise a 'directing function' they constitute a 'state bourgeoisie' engaged in 'class struggle with 'the proletariat'".<sup>(43)</sup> Bettelheim clearly recognises the difficulties of reducing all agents bearing directive functions to a common bourgeois class inheritance. But the recognition is made only on the condition of introducing purely subjective criteria involving the 'purposes' or 'proletarian practices' of party cadres within the administrative apparatus. The criterion of class membership is then centred on the question of ideological affinity with the proletariat. This is hardly a sufficient basis on which to construct a class map. Indeed as Miliband notes of the means used to establish proletarian affinity; "What these proletarian practices are remains unspecified. But the picture presented here is one where some cadres, lodged in one or

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(43) Miliband, R. (1975) 'Bettelheim and Soviet Experience' New Left Review, 91, p. 62.



other apparatus of power are members of the state bourgeoisie; while others, lodged in the same apparatuses of power are not. But this clearly deprives the notion of state bourgeoisie of any but the most arbitrary and subjective meaning."<sup>(44)</sup>

To be sure the problem of class location is a complex one outside the scope of the present formal indication of Soviet relations of ownership. What is of particular importance in all this is the fact that the category of the subject, introduced in order to deal with the complexity of economic centres of decision making and their further interrelation with juridic subjects and state property, surfaces yet again in the analysis of the class location of managers. Once again whenever economic subjects are introduced then it is necessary to indicate the particular bearers of that subjectivity, the location of managers in respect of the class map. Now the distribution of class relations depends upon the internalisation of competing subjectivities - the subjectivity of the economic subject or the subjectivity of proletarian practices. In a word class location depends upon the ideological affinity of the bearers of different kinds of subjectivity. As a result the economic subject is borne by the subjective aspirations of individual 'managers' who are but discrete incarnations of that larger subjective essence. But it is no less an economic 'subject' for all that.

Analysis of the work of Bettelheim thus clearly demonstrates the deep seated reliance on two major themes. They are, first of all, the idea that enterprises can possess the means of production by virtue of their existence as economic subjects.<sup>(45)</sup> And,

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(44) ibid, p. 62.

(45) See, for example, Scott's argument that ... "legal forms cannot have effective possession because they cannot act" (Scott (1979) op cit. p. 33) and the corollary that possession is always an attribute of real social groupings or collective actors.

secondly, the idea that law and economy are separate forms of 'subjectivity'. It should be apparent that each of these themes registers the effect of an implied Philosophical Anthropology. Indeed the co-incidence induced by the category of the subject between these respective themes has been alluded to already. There is though another point of more general interest, that is, the further correspondence of Philosophical Anthropology with the idea of a law/economy relation. The point is of crucial importance at this juncture for the simple reason that Soviet, or any 'transitional' society apparently registers the disruption or dislocation of the base/superstructure. Transitional societies are, therefore, all too prone to deal in legal survivals, on one side, and autonomous economic subjects, on the other. Two positions which effectively paralyse discussion. For example, the work of Bettelheim evinces this sort of tendency. The argument will be that both of these positions in some sense 'derive' from a common inheritance of Philosophical Anthropology and that they each represent but a particular variation of a more profound continuity.

To summarise and extend the particular affinity of the law/economy relation and Philosophical Anthropology it is necessary to argue two points. First of all, they each depend upon a common heritage that is to say they both imply the prior distribution of material reality into, in the first case, Law and Economy - in order to give the relation of law and economy - and, in the second case, persons and things (subject and object) - in order to give the relation of private property. The analysis indicates the parallel construction of purely formal continuities, for example, the prior division creates a space for 'legal' intervention to be possible. In a word the manner in which they pose the question is exactly the same and thus creates the very possibility of legal

intervention. The second point concerns the 'form' in which the pre-established problem is apparently 'solved'. Now the 'form' in which the solution is offered is necessarily diverse in respect of the discrete positions adopted on law and economy. For example, certain positions reached on the law/economy relation would seem to leave the 'form' of law alone - Karl Renner and Cutler et al are two instances of this strand of thought. Both Renner and Cutler et al allow for private property to embrace the reality of corporate relations of production and they do so on the condition that private property is but an empty frame to be filled by an orderly sequence of determinate social relations. Thus the two forms of dealing with the corporation open for this position are first of all, the extension of rights to adorn a new economic reality. In this formulation although the subject is displaced, nevertheless it is preserved, in the sense that private property rights are distributed as between discrete bearers of the corporate, that is to say subjective, essence. The subjective essence remains at the back of a whole series of fractured rights borne by various personnel within the corporation and by persons related to the corporation through, for example, their status as rentier agents. Hence the displacement/preservation of the subject. And secondly, the specification of the corporation as a subject, within the relation of private property requires that the concept of the subject is simply extended to include the corporation. The consequences of these respective positions together with the types of responsibility implied in each have been discussed already. They are included here as examples of the way in which the concept of private property implies the prior separation of law and economy and, in this case, their functional interrelation. More consequentially the form of law is left intact. For Renner the form of law survives and the content



is functionally implicated with the economic substratum and, for Cutler et al, the form of law is preserved on the basis of the functional correspondence between law, as a condition of existence of determinate relations of production, and the determinate relations of production themselves. Thus the conception of ownership in terms of property rights can be quite easily accommodated within the notion of conditions of existence since there is only one question to be put to the concept of 'property rights' namely, is it a condition of existence of determinate relations of production? Or, more to the point, is it functional for the economic substratum? Leaving the form of law out of account is to imply that law and economy are separate and that the inherence of Philosophical Anthropology in the concept of private property is left unquestioned. The influence of Philosophical Anthropology is re-inforced therefore on the basis of the functional interrelation of Law and Economy.

Conversely, when the 'form' of law is addressed in its reciprocal interrelation with the economic then the continuities between this position and Philosophical Anthropology are of a different, though persistent, kind. For Pashukanis, the form of law is interdependent with the form of commodity exchange, but the concept of interdependence can only be formulated on the basis that both law and economy are instances of the same division of the (human) subject from his essence. The law/economy relation is, therefore, forged on the basis of their mutual expression of the separation of the subject, man, from his essence and they are related insofar as they are indices of the same essential source. The particular significance of this sort of relation lies in its ability to explain the apparent specificity or autonomy of law as a mere surface phenomenon as a mere variation in the form in which the same underlying structure - the human essence - is manifest.



This position has been examined in more detail elsewhere; it needs only to be re-affirmed that the category of the subject ensures the identity of law and economy unfolded within the auspices of Philosophical Anthropology.

In both cases the concept of the subject is a necessary support of, and the most consistent solution to, the law/economy relation. In the first case it operates, via the concept of private property, to re-inforce the separation of law and economy - only to re-emerge as the only basis on which law and economy can be integrated. In the second case it exists from the start as the basis on which law and economy are separated - as forms of subjectivity - and then becomes the condition on which they are re-aligned - through their equivalent status as subjects.

To conclude, the view that private property is encapsulated in the unique relation of subject and object and the idea that law and economy are in relation one with the other are co-extensive not discontinuous. Furthermore, to the extent that the relation of subject - predicate - object - defines Philosophical Anthropology and given that a relation between law and economy entails the possibility of a legal intervention with respect to the economic then Philosophical Anthropology and juridic interventionism are one of a piece. The precise implications of this for anti-monopoly law should be apparent although they will be spelt out in considerable detail in due course.

It is possible to locate Bettelheim's work in relation to its inescapable affirmation of the fundamental principles of Philosophical Anthropology, namely, the theorisation of the economic in terms of subjects and the implicit separation of 'law' and 'economy'. Both of these have particular effects, first of all in the survival of a discrete legal form as a necessary context, or framework, for

the economic the persistence of the private property relation and the distortion of a theory of ownership crowned by the notion of a 'legal' intervention is affirmed. Secondly, the theorisation of the economic in terms of subjects ensures that a theory of ownership is riven through with the categories of Philosophical Anthropology and, therefore, of private property and law. In effect the former 'legitimizes' what has already been achieved by the second; for to argue the existence of economic subjects is to invoke the immediate continuity between economic relations and the categories of private property and law. So much so that the insertion of economic within legal relations is practically redundant.

Practical and political consequences follow on from this, not least of which being the inappropriate specification of the relation of possession. For Bettelheim the mere existence of a directing function is taken as evidence of the emergence of a state bourgeoisie, evidence which is re-inforced by the internalisation of the subjective standpoint of the enterprise itself by the bearers of that directing function. Agents of a very specific mode of calculation associated with the relation of possession are therefore confused with a very definite class formation i.e. a state bourgeoisie. There are obvious parallels here with the thesis of managerialism, a thesis which likewise supplies an independent class standpoint to a category of agents of ownership, a class standpoint that is supplied with appropriate aspirations and particular affinities and which ultimately rests on the voluntary interaction of competing subjectivities. Further, both Bettelheim and the theorists of managerialism achieve a crucial conflation, a conflation of the relations of possession and control. For Bettelheim, agents of possession are just as much a part of the

state bourgeoisie as agents of control and, in each case, the sole protection against co-optation into the state bourgeoisie is the preservation of 'proletarian affinity'. It matters little whether it is a question of an agent of possession or control, all that matters is the ideological standpoint, and the appropriate 'inoculation' against integration. Likewise managerialism assumes that agents of possession by virtue of their discrete social status exercise crucial decisions affecting the control of the enterprise. In this the exercise of distinct forms of calculation and decision criteria apparently negates the control of the overall allocation of the means of production. It does so because managers have a discrete subjective standpoint and ideological affinity all of their own, moreover, they are able to achieve this independence because their 'control' is crucial.

Politically, to argue the separation of law in the sense of its continuation as a discrete form which can 'stamp' social relations and to imply its inherence in the economic by virtue of the categories of Philosophical Anthropology is to fail to achieve the fundamental features necessary for the 'ownership' of the means of production by the direct producers. The persistence of a legal form - either as a separate level or as the means whereby the economic is represented in terms of subjects - prevents the formulation of a general theory of ownership necessary for the proper specification of how the means of production can pass into the hands of the direct producers.

Above all else this section on Soviet relations of ownership has demonstrated the abiding need to purge any discussion of ownership of the inheritance of Philosophical Anthropology. In other words the category of the subject together with the pre-emptive separation of law and economy - as a condition of their interrelation -

have specific consequences for any theory of ownership. These consequences are far from abstract theoretical queries since they crucially affect the way in which an analysis of the social relations of any society are confronted. Furthermore, the very possibility of 'socialist' relations depends, in a direct sense, on what it means to own the means of reproduction of material existence. More consequentially it can be readily concluded that the problem of any transition from one form of social arrangements to another is dependent upon the form of ownership. This argument has an immediate impact on the very question of anti-monopoly Law.

#### Conclusion:

What has so far been demonstrated is a typology which highlights the form of ownership as the crucial concept with which to grasp the distinctive features of social relations of production. As such the form of ownership is internally articulated and discontinuously ordered rather than essentially uniform and continuous. The form of ownership, therefore, is the lynchpin for a proper understanding of the pertinent differences between, for example, entrepreneurial and monopoly capital or between private and corporate 'property'. Now, insofar as anti-monopoly law is forged on the basis of the re-affirmation of private forms of ownership and laissez-faire competition over and against corporate forms of ownership then it becomes evident that the form of ownership is at once crucial to the characterisation of anti-monopoly movements and law and to the assessment of their effectivity. Given that the form of corporate ownership is the object of anti-monopoly hostility its persistence goes a long way toward locating and assessing the effects of the anti-monopoly movement, anti-trust legislation and regulation generally.



Thus anti-monopoly law can now be analysed according to two criteria :-

1. the form of ownership
- and 2. the problem of transition of one form of ownership to another.

The concept of transition is capable of explaining the essential features of anti-monopoly law, the anti-trust movement and regulatory enterprise and, in its adequate specification, is capable of accounting for the basis and the possibility of a 'legal' intervention in economic affairs. In other words it provides a coherent, rather than eclectic, basis on which to analyse anti-monopoly law, the corporation, 'private property', pre-bourgeois forms of ownership, anti-monopoly movements, corporate and white collar crime. To take only the example of anti-monopoly law what one is really talking about is the question of the transformation of the bourgeois form of ownership to the corporate form of ownership theorised on the basis of specific instances of resistance to, or reaffirmation of, one form of ownership rather than another; no more, no less.

It should by now be clear that several things have been attempted;

1. To provide a general theory of ownership which specifies three basic relations of ownership.
2. To examine four distinct forms of the articulation of these basic relations of ownership - bourgeois, corporate, feudal and 'Soviet'.
3. In doing so to provide a basis for the proper analysis of the parameters of anti-monopoly law namely bourgeois and corporate forms of ownership.

It has been argued that not only is this the most appropriate way of analysing anti-monopoly law, but that it represents the only way that a deeper sense can be rendered to anti-monopoly law.

A short excursus on the legal concept of ownership:

A sociological typology of ownership is obviously quite distinct from the more normal account of ownership undertaken on the basis of jurisprudential concerns. Although the two sorts of analysis are different there are, nevertheless, some similarities, most notably in the terminology used - title, possession and ownership. These verbal similarities, however, should not hide the very real difference between the two, particularly since it is argued that the legal concept of ownership often stands in the way of an adequate portrait of the 'corporate' relations under discussion. In order to highlight some, but by no means all, of the differences involved a brief discussion of the respective work of A. M. Honoré and Hans Kelsen concerning the concept of ownership will follow in the hope that it will illuminate some of the more important differences between the two sorts of approach. Needless to say space precludes the discussion from being in any sense an exhaustive appraisal of their work. A. M. Honoré has produced a most useful summary of the concept of ownership.<sup>(46)</sup> He describes a 'full' or 'liberal' concept of ownership which is common to all mature legal systems. This full or liberal ownership, whilst not merely a bundle of rights, is in fact an aggregate of legal incidents or, more simply, a list of elements. He argues that whilst the list is standard the incidents may vary both in content and in scope. The pertinent incidents are as follows: the right to possess, the right to use, the right to manage, the right to income, the right to capital, the right to security, the power of transmissibility, the absence of

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(46) Honoré, A. M. (1961) 'Ownership' in 'Oxford essays in Jurisprudence' ed. Guest, A. G. Oxford: Clarendon Press, pp. 107 - 147.

term, the prohibition of harmful use, liability to execution, and residuary character. Although all eleven incidents are necessary for full or liberal ownership there are, nonetheless, different degrees of ownership per se, certain definite combinations of incidents which fall short of liberal ownership but which go to make up a sort of ownership. This is clearly a distinctive and persuasive analysis of ownership which parallels certain of the arguments entailed in the typology of ownership namely, that 'ownership' is to some extent a general concept which admits of discrete components and degrees which vary. There are two differences, however, the first of which is trivial, the second major. First of all, as far as the typology of ownership is concerned there is no absolute form of 'liberal' ownership common to all mature legal systems or types of civilisation. There is no necessary or universal connection in this regard. It is quite true that Honoré does not argue the necessary place of a liberal concept of ownership, simply the universal presence of the concept within mature legal systems, but this does not detract from the validity of the point. The liberal form of ownership is accorded a priority by Honoré which would be denied by the typology. Secondly, whilst the legal incidents that Honoré has in mind are aggregated to form a full or liberal concept of ownership, the typology admits of no a priori form of ownership comprising an exhaustive list of pre-formulated incidents. To be sure, Honoré states that one can own 'things' or 'claims' to different degrees depending upon discrete combinations of legal incidents, and indeed there may be more than one 'owner', but the possible combinations are finite and the degree of ownership depends upon which legal incidents are aggregated and not primarily upon how they are interrelated. Furthermore, the variation in the

degree of ownership is only relative to a prior and definitive combination of incidents namely, full or liberal ownership.

The point of elaborating a typology of ownership<sup>is</sup> to emphasise, first of all, the content of the relations of ownership - how and what sorts of calculations are made and so on - and, secondly, the manner in which these relations are interrelated to form a definite type of ownership. Honoré is more concerned to establish variations upon a theme of liberal ownership, to specify the restrictions upon full ownership, than to examine the existence of radically different types of ownership. Honoré's vision of ownership entails definite consequences and generates considerable problems regarding the ownership of land. For example, Honoré states that in "... the early Middle Ages land in England could not plausibly be said to be 'owned' because the standard incidents of which I shall speak were so divided between Lord and tenant that the position of neither presented a sufficient analogy with the paradigm case of owning a thing".<sup>(47)</sup> Accordingly, the desire to see the liberal concept of ownership as a paradigm case prevents the proper theorisation of a distinct type of 'feudal' ownership. The fault is by no means peculiar to Honoré for similar attempts to regard types of ownership or property as simply variations or restrictions upon a single theme of 'liberal' ownership have been made by Alice Tay and C. B. MacPherson.<sup>(48)</sup>

The purpose of this exercise is not primarily to criticise Honoré's 'theory' of ownership but merely to describe the basic differences between this sort of theory and the typology of ownership

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(47) Honoré, A. M. (1961) op cit. p. 109.

(48) See Tay, A.E.S. (1978) in Kamenska, E. et al (eds) 'Law and Society' London: Edward Arnold and also Macpherson, C. B. (1975) in Kamenska, E. and Neale, R.S. (1975) 'Feudalism, Capitalism and Beyond', London: Edward Arnold.



enunciated earlier. As we have seen these differences are considerable. There is a further sense, however, in which Honoré's description of ownership is relevant to the issues under discussion. For example, in describing the way in which 'law' can theorise upon different types of ownership and does provide a more or less adequate 'context' for the elaboration of the corporate form, Honoré demonstrates that law is not hopelessly overwhelmed by the inexorable growth of de facto concentrations of power. The way in which he describes the corporation in terms of a variable collection of material objects and claims is a case in point. Likewise, his definition of 'title' as the conditions of fact which must be fulfilled in order for a person to acquire a claim to a thing is pertinent. But it must be emphasised that in order to account for the concept of the corporation the full concept of ownership is fractured into a series of disaggregated incidences. Similarly, the basic relation of private property is also dissected in order to produce an 'adequate' portrait of the corporate form of ownership. The point at issue, therefore, is whether the manner in which these 'incidents' are interrelated, together with an adequate portrait of precisely what it is which is interrelated, is amenable to Honoré's analysis of ownership. In other words it is arguable that the way in which these 'incidents' are interrelated within different types of ownership accounts for the qualitative difference between them. It is not merely a question of a list of legal incidents and their different aggregation for the manner of aggregation is fundamentally important as is the content of these incidents and their nearly infinite variability. Moreover, Honoré perhaps sums up the basic limitation of a legal theory of ownership, however complex, when he states that: "The final picture is that of a set of related institutions of great complexity which are best studied against the

background of the basic model - a single human being owning, in the full liberal sense, a single material thing".<sup>(49)</sup> It is argued here that attention to such a 'background' obscures the distinct corporate form of ownership and reduces it to a mere distortion of an ideal type of full liberal ownership; a variation upon a single theme rather than a radical departure.

The example of Hans Kelsen on 'ownership' is perhaps more intriguing. Although not exactly putting forward a theory of ownership, he, nevertheless, makes a number of pertinent remarks upon the so called distinction between the physical person and the juristic person. These remarks pertain both to the concept of private property and to the idea of a corporate personality. Insofar as he talks of ownership per se, however, he points out that just because an individual actually possesses something this does not mean that he is its legal owner; there is a difference between actual possession and ownership.<sup>(50)</sup> Furthermore, he argues that Pashukanis must in fact have an extra-juridic concept of ownership simply because individuals 'own' goods prior to exchange and thus prior to the co-incident form of legal ownership. Whether or not this is a proper interpretation of Pashukanis' position - and the problem has been attributed above to the dual determination of law, once by its function and once by its expression of a social relation - Kelsen reaches a conclusion which only holds in an extremely limited sense. He concludes that ownership in an organic and extra-juridic sense is a contradiction in terms. Insofar as this is a tautology

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(49) Honoré, A. M. (1961) op cit. p. 147.

(50) Kelsen, H. (1955) 'The Communist theory of law', London: Stevens & Son, p. 93.

then Kelsen is correct. But there is no reason why this must follow, providing the concept of ownership is established in a way which is altogether distinct from the juridical concept of ownership. It is argued here that a distinct concept of ownership has been established.

Kelsen's work is more pertinent to the issue involved where he analyses the concept of a legal person. He defines the legal person as follows. "The legal person is not a separate entity besides its' rights and duties, but only their personified unity or - since duties and rights are legal norms - the personified unity of a set of legal norms",<sup>(51)</sup> and "The person exists only insofar as he 'has' duties and rights; apart from them the person has no existence whatsoever".<sup>(52)</sup> The person is merely the locus or the bearer of rights and duties. Therefore, neither the physical person nor the juristic person is a human being, for this latter concept belongs to biology rather than law. Accordingly, the idea of a prior - subject, an original human being or labouring subject designed to ground the relation of private property and put it beyond man made law, is an evident absurdity. It follows that there is no logical reason why the so called antithesis between natural and fictive persons should persist within law. Furthermore, law should have little difficulty in construing the corporation as a legal person because it is not necessary to reduce the corporation to the status of an actual human being endowed with human capacities. Kelsen then goes on to state the important fact that the corporation

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(51) Kelsen, H. (1945) 'General Theory of law and state', Cambridge: Massachusettes, p. 93.

(52) ibid, p. 94.

as such only legally exists through its statute. Moreover, once established the corporation can be said to 'act' in one of two ways: either by imputing human actions to the corporation viewed as a legal person or by establishing the partial legal order which designates human beings as 'organs' of the corporate person. Therefore, Kelsen's statement that only the behaviour of human beings can be regulated by a legal order is circumvented by arguing that duties and rights are represented indirectly to human beings via a partial legal order - a corporate charter or statute. The corporation mediates between human beings and a National legal order.

The foregoing exegesis of Kelsen's portrait of the legal person would appear to confirm the way in which law typically construes the corporation by reference to a double standard of responsibility - collective and individual. In this sense Kelsen argues that "The attribution of human behaviour determined by the legal order to a community constituted by this same order, is not carried out with consistency because it is not always carried out according to the same criterion".<sup>(53)</sup> As a statement of the confusion which often surrounds the conception of the corporation within law this is particularly appropriate. Kelsen does not escape the dilemma entirely for he also equivocates before emphasising the centrality of human beings and the way in which the corporation mediates their rights and duties. Whether the corporation is best viewed as an aggregate of rights and duties pertaining to actual human beings or as a legal person in its own right is clearly important. Irrespective of which perspective prevails there is an important limitation encountered by each. As we have seen already law seems

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(53) Kelsen, H. (1967) 'Pure theory of Law'  
Berkeley: U.O.C.P. p. 181.



to oscillate between characterising the corporation as a person - in a variety of senses and with a plethora of consequences - or in terms of the actions of its individual human 'organs'. It has been argued here that neither conception is any more successful than the other in ascertaining or accounting for the complexity of corporate relations. Kelsen's notion of the legal person as a 'personified' unity is hardly an adequate mechanism for grasping the profound interrelationships which make up the corporation. The very idea that the corporation can be conceived as a unity is at the heart of the problem irrespective of whether that unity comprises an aggregate of human actions or legal norms. Whilst clearly distinct from the sort of position which views the corporation as an analogue of an actual human being Kelsen's idea of a legal person is no more successful in this regard.

CHAPTER V

ANTI-TRUST LEGISLATION

It has been argued throughout that any assessment of anti-trust legislation must take place against the background of an implicit contest between 'competition' and 'monopoly' and, thus, between two relatively distinct types of ownership. Whilst it is quite true that specific articles of anti-trust legislation do not always reference this contest directly, it will be argued that anti-trust legislation cannot be properly understood unless, and until, it is realised as part of an overall strategy designed to defend free enterprise against the dangers inherent in monopoly. Therefore, the underlying theme behind any examination of monopoly, price fixing, market division, rebating and so on, is the ongoing change in the form of ownership and the structure of industrial organisation which, in a very real sense, permit the almost infinite permutation of monopolistic 'forms' and, thence, monopolistic practices.

The changing form of ownership is indeed important, for the specialisation of ownership relations entailed therein, means that the market is no longer represented directly to independent entrepreneurial units, in the manner so often espoused by classical economic theory. Rather, the form of ownership plays a large part in the organisation of both the 'internal' corporate environment and, in various forms of monopoly, the wider market structure. Furthermore, the strategies by which the corporate form structures and dominates the market for a range of products and by which agreements with formally separate organisations are entered into, with regard to the division of these particular markets, are inseparable from the way in which the corporation is organised. It is not that the monopolistic corporation is insulated from market pressures, so much as that the market and the 'corporate'

form of ownership actually interpenetrate. The market is not represented as an external force, endowed with any number of determinative capacities, but is effectively constructed through a series of discrete calculations characteristic of definite relations of corporate ownership.

A consideration of the form of ownership is quite basic to the assessment of anti-trust legislation. There are, however, a number of specific issues and dilemmas which characterise anti-trust legislation and which must form part of a general discussion of the changing form of ownership. These particular problems will be addressed as issues internal to the more widespread proliferation of what can only be termed anti-trust enterprise: that is to say, the ongoing controversy and organisational basis which sustains and perpetuates the perhaps uniquely American fascination with anti-trust legislation. Accordingly, questions such as - 'can law regulate economic affairs?' - assume an importance all the more exaggerated for their normally not being asked or, more accurately, for not being pursued with any degree of sustained attention. Not only is the question 'can law regulate economic affairs?' seldom addressed but, rather - because it contains the seeds of a particular weakness inherent in the very idea of a specifically legal regulation of economic affairs - it cannot even be asked. The question is almost as meaningless as it is crucial, for the reason that law is fundamentally constrained by its role as a formally separate apparatus of regulation. Therefore, even to ask the question is to invite a negative response.

Broadly speaking, this Chapter is concerned to map out the general features of anti-trust legislation outlined during a period of rapid change in the form of industrial ownership. It is not so



much concerned with the more contemporary use of law to control pollution or to ensure socially responsible corporations (although these issues are considered) as with the historical development of anti-trust legislation during the last years of the 19th and the earlier part of the 20th Centuries. This period is chosen because it highlights, quite dramatically, the attempted use of law to control a fundamental change in the form of ownership.

What, then, are the pertinent details concerning the structure of anti-trust law? In 1954 Judge Wyzanski made the following, rather revealing, comment in the course of the United States v. United Shoe Machinery Corporation case:

"In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law .... They would not have been given, or allowed to keep, such authority ... if courts were in the habit of proceeding with the surgical ruthlessness that might command itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realisation of the social, political, and economic advantages of dispersal of power".<sup>(1)</sup>

This comment is intriguing for a variety of reasons, not least because Judge Wyzanski would seem to be suggesting that law is a potentially ferocious weapon vis a vis monopoly power, and that this ferocity is kept in check only by the reasonableness of juridic interpretation and by the fearful anticipation of the political backlash which would attend any really ruthless

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(1) United States v. United Shoe Machinery Corporation, 110 F. Supp. 295, 348 (D. Mass. 1953); 347. U.S. 521 (1954).

enforcement. The latter part of this particular interpretation is shared by the so called revisionist historians, and, in particular, by Pearce & Kolko but, nonetheless, is flawed in certain very important respects.<sup>(2)</sup> Amongst other things, this Chapter will attempt to demonstrate a number of ways in which this interpretation is defective. First of all, it will be argued that the structure of law is such that it places severe limits on the suitability of anti-trust legislation for its avowed purpose of controlling monopoly, irrespective of whether and how such laws are enforced. Secondly, it will be demonstrated that at certain periods the enforcement of anti-trust legislation has been pursued with 'surgical ruthlessness', and indeed with some measurable success, but that the central feature of monopoly - the structured interrelationship of markets and enterprise units - remains intact. Finally, it will be suggested that the mechanism which inhibits anti-trust legislation is not primarily self restraint or fear; still less is it a community of reasonable and like minded men. Rather, the main reason lies with the essential structure of 'law' and, in particular, the legal conception of ownership. The argument is not that law has no effect whatsoever, for palpably law does have very real effects on economic conduct, but that law is prevented from touching the core of corporate relations of ownership. The suppression of law in this respect occurs for quite specific reasons which pertain to the nature and situation of law, rather than to any exogenous and, therefore, resistible variable. For example, power, purpose and conspiracy are often

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(2) See Pearce, F. (1976) op cit. & Kolko, G. (1965) op cit.

used to 'explain' the apparent failure of anti-trust legislation but such explanations are 'wanting' in a number of respects.

At its base the issue of anti-trust legislation involves two questions. First of all, is the principle of legal intervention an appropriate means for the regulation of an economic system based ostensibly on laissez-faire economic theory? That is to say, what is the precise role of law with regard to economic affairs? Secondly, are legal categories and concepts relevant to the regulation of economic conduct? Or, in other words, what is the exact scope of law vis a vis 'economic' relations.

In the first respect, anti-trust legislation does indeed generate a rather perplexing dilemma. Anti-trust legislation is responsible for maintaining and defending a free enterprise system based on private entrepreneurial interests, decentralised decision making and, on a legal framework which enables free uninhibited contest. Thus, anti-trust legislation is supposed to intervene in order to maintain the apparently automatic self regulation of the free enterprise system. But it is possible to construe the setting of limits involved in such legal intervention as an unwarranted, even illogical, encroachment on the uninhibited pursuit of free competition. There is, of course, a possible distinction to be made between the role of law, insofar as it may provide a series of enabling provisions for the pursuit of entrepreneurial endeavour and, the quite explicitly interventionist stance of law in the sense that it sets limits to such endeavour. This distinction will be discussed later. Nevertheless, once it is accepted that anti-trust legislation does involve setting limits to economic endeavour (as it quite explicitly does) rather than merely specifying certain enabling provisions which permit or encourage competition, then at least two interpretations of anti-trust legislation are commonly



afforded. Anti-trust legislation is viewed either, as a comprehensive charter of economic liberty, preserving free and unfettered competition as the rule of trade or, on the contrary, as a "destructive principle ... in irreconcilable opposition to the premises and principles of operation of the free enterprise system".<sup>(3)</sup>

Law would appear to be presented with considerable difficulties in even 'thinking' about intervening in economic affairs. The problem is quite easily stated. The paradox faced by anti-trust legislation reduces to the requirement that free competitors are preserved at the same time as the effect of their (free) competition is limited. More precisely, the problem, for anti-trust legislation, is how to assert free enterprise by statutory forms of regulation and state intervention. To be sure, this paradox has taken up a great deal of attention in the interpretation and contextualisation of anti-trust legislation. But there is a very real sense in which it stems from a partial conception of the 'economic' as some sort of self regulating mechanism, against which legal regulation and government intervention in general can only appear as destructive, even as an anathema, to the adherents of classical economic theory. It is arguable, however, that this paradox is merely a result of regarding the relation between 'law' and 'economy' in a particular way. Accordingly, the distrust of legal regulation and statutory involvement is no more than a direct corollary of the idea that law intervenes in a self equilibrating economic sphere. Law and economy are, thus, separate instances, for it is only on this condition that (legal) interference can be seen as the bete noire of the sovereign economy. Not only does this particular conception of the relationship between law and economy discount the role of law

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(3) Petro, Sylvester (1962) Fortune: (Nov.)



as a framework which sets up economic actors and enables free enterprise but, more importantly, it supposes that a laissez-faire economy can be defined, and indeed operate, in exclusively economic terms and, by analogy, as a predominantly economic reality. On the contrary, it has been demonstrated elsewhere that the 'legal' and the 'economic' cannot be represented as separate instances without generating severe problems of priority. Perhaps the most serious of these problems is revealed, in a practical sense, by the way in which anti-trust legislation is often regarded as an interventionist apparatus capable of remedying defects generated within a separate economic sphere. The fact that anti-trust legislation is less than successful in this objective is seldom traced to the viability of using law in this way but is instead, all too often, reduced to the fallibility of individuals or institutions and to the corruption of political control.<sup>(4)</sup>

There is a widespread conviction that, as part and parcel of the 'law', anti-trust legislation does have an impact on the conduct of economic affairs. This view is upheld with some persistence, despite the somewhat chequered history of anti-trust legislation in action. But this is not to say that there is no controversy over exactly what law should or should not do. On the contrary, this issue would appear to preoccupy the majority of commentators on anti-trust legislation. There is, though, a degree of complacency with regard to the issue of whether law can achieve a definable objective, once it is agreed upon. For example, the question which appears to haunt any discussion of anti-trust legislation is not so

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(4) One exception is perhaps the work of Stone; Christopher (1975), 'Where the Law Ends', New York: Harper, which will be discussed later.

much whether law can regulate 'economic' relations but, rather, in which direction, to what effect and how far law should regulate economic affairs and business conduct in general. Therefore, the determination of the limits which should be placed upon these assumed powers of legal regulation would seem to displace the prior consideration of whether or not law can regulate 'economic' relations with any measure of success or penetration. Accordingly, law is seen as all powerful and ubiquitous, rather than limited and marginal. It is almost as if the regulation of the regulators takes precedence over the regulation of corporate structure.

Of course, the question - can law regulate economic affairs? - is perhaps an impossible one to ask since law and economy cannot be consistently represented as separate instances. But it is a question which must be asked if anti-trust legislation is to have any meaning, other than as a mere cynical gesture by congress. Further, whilst this question should pre-occupy any discussion of the legal regulation of monopoly, nonetheless, it betrays a questionable heritage since it implies a discrete realm of social structure inhabited solely by law. As we shall see, the general discussion of anti-trust legislation seems to ignore the viability of 'law' as a regulatory agency.<sup>(4a)</sup> Moreover, even if the question were asked, it would appear to depend upon a specific conception of the nature of law which is at best limited and at worst erroneous.

It has been argued, therefore, that law falters before the objective of regulating corporate relations precisely because of the way in which it is regarded; namely, as a separate institutional form able to review and thence to regulate the conduct of economic affairs. But if law cannot be 'baptized' in this way as a separate instance, how then does it become involved in the conduct of economic exchange and in the form of ownership? It was indicated

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(4a) Although see below p. 201 et seq.

earlier that a distinction could be drawn between the role of law as a regulatory agency and its integration with other social relations. There is a difference between the sort of legal context required for the operation of 'economic' relations and the restriction and limitation of those relations by forms of legal regulation and administrative agency. Law as an appropriate context and law as a regulatory agency are two very different ways of looking at the nature of law. Whereas the existence of the legal structure of private property may enable the furtherance of corporate business forms, insofar as the same structure characterises the analysis of corporate ownership, inherent in anti-monopoly law, it will be argued that it is far from being appropriate to its avowed task of regulation. Accordingly, whilst relations of production can 'operate' and, to some extent, 'exist' through the concepts and relations specified in, for example, company law - when law is 'raised' above the level of its mutual implication with the 'economic' and cast as an instrument of regulation or prohibition quite separate from that which it is designed to regulate - then the die is cast. It will soon be apparent that the very separation of law from corporate forms of ownership appears to haunt anti-trust legislation and, in turn, seems to foreclose the possibility of effective legal regulation of corporate relations.

This, essentially misplaced, faith in the viability of a discrete agency of legal regulation is amply sustained in the constitutional doctrine of the separation of powers. It is misplaced in this particular case because it is arguable that corporate relations can only be regulated effectively at the interface of their operation; at possession, title and control relationships. To be sure, this regulation may involve a discrete

regulatory agency but that agency cannot assume the primary responsibility for such regulation, nor can it be a sufficient means for regulation independently of the primary articulation of ownership relations. Thus, company law could be said to 'work' in terms of corporate relations of production because the operating exigencies mean that the primary responsibility is placed with the relations of possession, control and title, but that a residual role is left for 'law' as a form of adjudication and guarantee for title and contract. If this relationship is reversed, as in anti-trust legislation, then the full contradiction of the 'fallacy of discreteness' is revealed with quite disastrous consequences for regulation. Regulation is then endowed with the primary responsibility for controlling the relations of ownership characteristic of corporate structure; preventing monopoly and forestalling collusion. Law is quite simply unable to accept such responsibility and, for that reason alone, is severely limited as a regulatory agency.

If the issue of the legal regulation of economic affairs imposes severe limits on the role of anti-trust legislation then the content of the particular concepts characteristic of Anglo-American and European theories of legal ownership clinches the further restriction and operation of an inappropriate principle, namely, the legal regulation of economic relations. In a word, the way in which law is used is as important as the fact that law is used to regulate economic conduct.

Chapter four revealed a considerable objection to the idea that the corporation can be regarded as a discrete entity derived by analogy with the human subject and assigned all kinds of human attributes, physical capabilities and acting capacities each inserted within legal forms. This essentially anthropomorphic conception



of the corporation would appear to confirm the political prejudice that corporations per se are capable of political action. Accordingly, the rather unhappy division between legal and natural persons has further facilitated the assimilation of the corporation as a human subject. As Stone remarks, "... whenever the law spoke, expressly or implicitly, in terms of, 'no person shall ...', that rule was smoothly, if unreflectively, transferred to corporations";<sup>(5)</sup> a sentiment which has been reiterated elsewhere by Hayek.<sup>(6)</sup> Indeed, the conflation has proceeded to good effect but with precious little justification. For example, this sort of position not only informs sections of the radical movement, insofar as it drifts into rhetorical tirades against big business (analysing social structure as if it is simply the reflex of corporate aspirations) but, it also circumscribes the legal response to corporate relations. This sort of 'legal' response indicates the way in which anti-trust legislation, and the concept of private property, are bound up together, most notably, in the areas of the corporate boundary, conspiracy and the intentional corporate actor respectively.

#### The Boundary.

The boundary is very important for the legal redress of monopoly 'power' and collusion because it is viewed, at one and the same time, as the earmark of size and as the medium for any sort of collusion between separate organisations intent on fixing prices or carving up markets.

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(5) Stone, C. (1975) op cit. p. 28.

(6) Hayek, F. (1949) op cit.

Therefore, the boundary occupies a central, although perhaps unacknowledged, place in the legal regulation of corporate 'power'. But the concept of the boundary is, to say the least, a very uncertain one evincing as it does, a clear space inhabited solely by a corporate essence.

The conventional legal response to the issue of corporate boundaries consists in regarding them as either legitimate or illegitimate, but the question of whether the boundary is a relevant measure is seldom considered. Thus, Justice Brandeis was able to write extensively on the 'curse of bigness' as if bigness were easily definable and, in turn, the fundamental aspect of monopoly.<sup>(7)</sup> Where the concept of the boundary becomes more explicit, it is considered as an element necessary to the definition of parallel response, collusion and price fixing. For example, the existence of a boundary is essential for the finding of collusion between separate organisations. In this respect, it is often noted that treating collusion more severely than size, as such, actually encourages the proliferation of mergers. Therefore, boundaries are important for two main reasons. First of all, because boundaries appear to demarcate a 'proper' market size, as if boundaries are crucial in this respect rather than contingent and, secondly, they also define separate spheres of business activity such that collusion between distinct organisations can become a meaningful concept. Accordingly, it will be argued that the concept of the boundary is less than persuasive as a test of competitive behaviour and free enterprise.

If the concept of the boundary is vitiated in respect of corporate relations of production how then can these relations be

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(7) Bickel, A.M. (1967) 'The Unpublished Opinions of Mr. Justice Brandeis', Chicago: U.O.C. Press.

adequately described? Attention to relations of ownership removes the necessity of referring to boundaries as forms of demarcation. Therefore, dissolving the relevance of legal or factual boundaries enables the analysis of corporate structure as a fluid, changing form of organisation. Accordingly, there is no reason why the corporation need be restricted to empirically definable boundaries. Although if the corporation is regarded thus, can it actually be specified as a separate entity, for surely the result of dissolving the privilege accorded to the boundary is that the corporation becomes inseparable from society at large. Therefore, all social existence would seem to be predicated upon a ubiquitous corporate 'family'. There are, then, two principal options for this sort of perspective. Either, social structure is simply a reflex of corporate organisation or else, the corporate form of organisation is a kind of sociological a-priori which informs all aspects of sociality, corporate and non-corporate alike. This last alternative is perhaps implicit in the contemporary discussion of corporatism, which sees a widespread proliferation of the corporate form throughout society in general and, in particular, in the conduct of political and 'economic' relations.

In order to avoid the reduction of social structure to corporate relations of ownership it is necessary to be quite clear on the nature of ownership relations. Obviously some form of demarcation between 'social structure' and 'corporate' organisation is required if the worst excesses of what Poulantzas has described as anti-monopoly politics are to be avoided: that is to say, the mobilisation of a potentially infinite population of all those disadvantaged in some way by monopolies.<sup>(8)</sup> To be sure, the problem of demarcation,

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(8) Poulantzas, N. (1975) op cit.

along with the spectre of some sort of instantiation of spheres of sociality as levels, appear as important restraining items on the analytical agenda. It is arguable, however, that denigrating the priority of the boundary; as a legitimate mechanism appropriate in itself as a form of regulation, as a vantage point from which to define collusion and, finally, as an empirically or legally given state of affairs, is altogether different from arguing the complete identity of big business and social structure. In principle demarcation is perfectly possible on this basis, but it is part and parcel of the definition of relations of ownership. Thus, the corporation does not appear as a single entity characterised by a unique corporate essence or personality. Rather, the corporation is best considered as an articulation of relations of ownership. In these terms there is no reason why the corporation need be a single entity with identifiable boundaries. It is almost as if the corporation degenerates into a series of more or less discrete relations of ownership. Any identity resides in the configuration of these relations, which need not be equivalent to any easily identifiable corporate entity or personality. For example, the structure of Standard Oil, I.T.T or General Motors is by no means exhausted by their physical being or their formal specification. On the contrary, the relations of ownership generate a whole series of interrelationships which are at once broader and more specific, relating particular aspects of possession, title and control to the more general form of calculation characteristic of the 'market' situation.

On the other hand, the issue of demarcation as such does not necessarily prevent the reduction of social structure to the corporate entity. For example, even as a separate entity, the corporation can be set loose to inscribe its various interests as formally



separate political and social institutions. Social structure can then be viewed in terms of asymmetrical power relations, whereby the corporation comes out on top and the rest is reduced to an appendage of corporate aspirations. Therefore, the way in which corporate relations of ownership are distinguished from social structure is important. The fact that anti-trust legislation is saddled with a particularly rigid conception of the monopolistic corporation as constrained within easily identifiable boundaries, together with a specifically legal conception of the conditions whereby boundaries can be breached - collusion, conspiracy and intent - means that the legal response to monopoly is at best limited.

From the foregoing remarks it will be readily apparent that the corporate form of ownership entails the effective suppression of boundaries as obstacles to the pursuit of corporate activity. Moreover, the consequent denegation of the 'subject', together with its essentially limited sphere of action, is necessarily implied in the corporate form of ownership. Notwithstanding the essential structure of corporate relations of ownership, the conventional legal/administrative response is perhaps twofold. The first response is to attempt to limit boundary size by preventing mergers and by dissolving monopolies. In this sense the provisions of the 1914 Clayton Act are expressly directed at the objective of forestalling mergers. Thus, section seven of the Clayton Act prohibited the acquisition of the stock or share capital of one corporation by another, wherever the effect may be substantially to lessen competition or tend to create a monopoly. Originally applying only to the acquisition of the stock of another corporation section seven was amended in 1950 to include the assets of any corporation.<sup>(9)</sup> The legislation was seen as a method for preventing

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(9) The relevant provisions were amended in the Celler-Kefauver Act 1950.

major corporations from emerging as 'trusts' through the acquisition of stock, and later assets, of competing corporations and, thereby, dominating the industry through the devices of a holding company. Whilst the Clayton Act was seemingly clear in this objective, the relative lack of action under section seven meant that, to all intents and purposes, 'mergers' went on apace. Likewise, the dissolution of monopolies is often regarded as the ultimate sanction behind the Sherman Act. In practice however, things were rather different. For example, the Attorney General's Committee was moved to state that in the first sixty years of the Sherman Act's history, the .. "courts have in only 24 litigated cases entered decrees requiring divorcement, divestiture or dissolution".<sup>(10)</sup> Nevertheless, there were three important cases involving the dissolution of so called 'single firm' monopolies. These were; United States v. Aluminium Co. of America (1945); United States v. Pullman Co. (1943/47); United States v. United Shoe Machinery Corporation (1953/54). As well as being constrained in principle, anti-trust legislation was, therefore, considerably restrained in practice. The important point being that even if these provisions had been strictly enforced then their effect would have been at best marginal and at worst irrelevant. This for the reason that the 'boundary' generates an inaccurate picture of corporate relations and, in the remedy of dissolution, an inappropriate redress. The second sort of response is to argue that boundaries should be made impermeable and able to countenance neither collusion nor conspiracy. This sort of response will be discussed in more detail later.

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(10) U.S.A. Dept. of Justice: Attorney General's National Committee to Study the Anti-trust Laws, (1955). p. 354.  
U.S. Government: Washington D.C. (Henceforth: AGNCAT).

It is sufficient to say, at this juncture, that the boundary is seen here as the effective guarantor of truly independent spheres of decision making.

Both sorts of response to the problem of the trusts view the existence of an effective boundary as significant. Whilst the first heralds the boundary as a factor which can limit the extent of monopolisation the second attempts to forestall any breaches in the boundary defences. In some respects, then, the boundary is seen to operate both as an hermetic seal and as a site for the struggle against monopolisation. To an extent the two objectives contradict one another, for the very faith expressed in the boundary as an important constraint on monopolisation is compromised by the existence of strategies designed to secure the boundary against potential abuse. This is indeed a persistent tension within anti-trust legislation. On one side, there is the abiding faith in, and affirmation of, the boundary principle as the guarantor of truly independent arenas of decision making and entrepreneurial endeavour, both necessary and sufficient for the existence of free enterprise. On the other, there is the gradual recognition that the mere existence of a boundary per se, whilst necessary, is insufficient as a last frontier of private enterprise unless there is quite considerable protection from abuse. What this amounts to is the expansion of a blind faith in the capacity of free enterprise to regenerate itself, if given an even break, over and against the deeply held suspicion that given half a chance 'autonomous' corporations will be compliant in a conspiracy which threatens their very autonomy. From this last perspective, it is insufficient to provide a context for, and a limit to, private centres of decision making, since a far more rigorous regulation of their interaction is required if private enterprise and free competition are to be



guaranteed. Both types of general response seem to agree upon the fact that law and economy are interrelated. Where they differ is over the capacity of privately owned production units to conduct themselves according to the dictates of a free enterprise economy. Sylvester Berki, summarises the difference thus, "Are we interested in competition as a way of life, stressing the role and freedom of each competitor, or are we interested in obtaining the performance associated in theory with competition, the efficient allocation of resources and the implied rates of relative factor returns".<sup>(11)</sup> There are then, two clear links at work behind the legal response to monopoly. The first is between the regulation of abuse and the consequent increase in the role, but not the necessary realisation of legal/bureaucratic intervention in legal affairs. The second, exists between the provision of a legal context (a set of statutory limitations) and the increased circumspection and formal certainty with which law tends to regard economic conduct.

At this stage it is necessary to examine in more detail the interrelationship of 'legal' and 'economic' interpretations inherent in anti-trust enterprise. In particular, the argument requires a more detailed examination of the trinity of the major federal laws governing interstate activity: the 1890 Sherman Act; the 1914 Clayton Act and the 1914 Federal Trade Commission Act.

#### Legal and Economic interpretations of anti-trust legislation.

The relation between law and economy is indeed complex. So much would be granted by those intimately bound up with the operation

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(11) Berki, S. (ed.) (1966) 'Anti-trust Policy' Boston: D.C. Heath, p.(vii).



and working potential of anti-trust legislation. Thus Lewis observes that, "... the Sherman Act .. certainly lacks something as a process for working out the pattern of an economic order",<sup>(12)</sup> by which he seems to despair of the ability of the Sherman Act to grasp economic reality and to comprehend economic theory. Again the view that economics **e**xists as a means of keeping anti-trust law from being wholly irrational,<sup>(13)</sup> appears to invert the pessimism of Lewis whilst at the same time tending to re-inforce the general distribution of reality into discrete academic spheres, 'law' and 'economics'. Lewis and Turner thus succeed in reaffirming the conventional divorce of 'theory' from 'practice', which holds that anti-trust legislation does not work in practice, rather than the more pertinent fact that it cannot work in principle. Whilst Lewis addresses the Sherman Act as an impossibly abstract theoretical formula, Turner has more faith in the interjection of economics as a dose of reality. What they each seem to imply is that anti-trust legislation is all well and good as a theoretical principle of free enterprise, as a benchmark of free enterprise and as an apparatus of formal prohibition. When it comes down to the practical regulation of contemporary economic reality, however, things are altogether different. Over and against this sort of interpretation, it is argued here that the nature of anti-trust legislation is such that it cannot be sectioned into theory and practice, that the main reasons for the failure of anti-trust legislation are due, respectively,

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(12) Lewis, B.W. (1948) 'Discussion' American Economic Review (38) p. 2.

(13) Turner, D.F. (1963) 'Principles of American Anti-trust law' International & Comparative Law Quarterly (6) p. 1.

to the strategic choice of law as the mechanism of regulation and to the conceptual inheritance with which law addresses the corporation. Therefore, law does not simply capitulate in the face of the practical difficulties of dealing with corporate interrelationships. Indeed, far from any such capitulation, the history of anti-trust legislation is littered with any number of genuine attempts at forestalling anti-competitive behaviour. Rather, anti-trust legislation is vitiated in the very process of attempting to get to grips with corporate relations of ownership: first of all, by the idea that law is in some sense a separate agency of review and regulation and, secondly, by the conceptual equipment which provides the parameters of legal regulation namely, intent, conspiracy and private property.

In one respect the contest staged between 'legal' and 'economic' interpretations of monopoly marks the transition of anti-trust statute law into the burgeoning of anti-trust enterprise. That is to say, there is an ongoing attempt to square economic requirements, efficiency, expansion, development and so on, with legal regulation; a continuing process of interpretation of anti-trust legislation, together with the development of bureaucratic forms designed to cope with the institutional complex required for active regulation and intervention, rather than the altogether simpler, because formal, process of prohibition. It is notable that the introduction of essentially economic criteria is made relevant in respect of interpretation under the 'rule of reason', whereas the conventional structure of legal thought is more easily situated in relation to the per se doctrine. Thus, the controversy surrounding the introduction of greater flexibility under the guise of the rule of reason<sup>(14)</sup> designed to assess intent, practices and consequences,

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(14) Chief Justice White, *Standard Oil Co. of New Jersey v. U.S.* 221 U.S. 344 (1911).

rather than monopolisation per se, perhaps encompasses the translation of law into a regulatory machinery equipped to deal with the inevitability of monopoly and required to mitigate only its worst excesses. Additionally, this particular discussion exposes certain contradictions within the basic structure of anti-trust legislation which are responsible, both for its restriction as an effective agency of regulation and for its frustration as an agency of socio-economic change.

The historical resonance of this debate is found, specifically, in the dislocation between the general thrust of anti-trust statutes, which affirm competition and their interpretation, which is more often than not concerned with the quality of competition than the actual existence of free competitors. There are, of course, certain exceptions to this quite general trend. For example, in the 1936 Robinson-Patman amendment to section two of the 1914 Clayton Act, the juridical concept of 'intent' is so attenuated as to dissolve entirely into an analysis of the commercial effects of price discrimination.<sup>(15)</sup> At the same time though, the amendment was expressly designed to protect the existence of small traders from the ravages of wholesale marketing chains and to insulate individual competitors against the full effects of fierce competition. The political exigencies involved in protecting small business, at all costs, to some extent encouraged such apparent 'peculiarities' and will be discussed in a later Chapter.

It is still quite common to describe the Sherman Act, "... as a charter of freedom (which) has a generality and adaptability

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(15) Neale, A.D. (1966) 'The Anti-trust Laws of the U.S.A'.  
Cambridge: University Press.



comparable to that found to be desirable in constitutional provisions".<sup>(16)</sup> It is this adaptability which apparently enables the Sherman Act to stand, both as a unique expression of economic liberty, a charter of economic freedom, and as a framework for regulatory agencies. This generality in effect spawns the two 'sides' of anti-trust, providing substance for those who would argue for the prohibition of all manifestations of monopoly (but not necessarily monopoly as such) and for those who merely attempt to reserve the benefits incidental to competition within an overall context of oligopoly.

What, then, is meant by the rule of reason and the per se doctrine? Interpretation according to the rule of reason and the per se doctrine both stem from the generality in the phrasing of the Sherman Act. This generality provides for a choice with regard to the meaning of the concepts monopoly power and monopolising. Whereas interpretation according to the rule of reason refers to zones of legality/illegality, depending upon whether or not the restraint of trade in question is likely to harm the public interest, the per se doctrine renders certain restraints of trade illegal outright, for example, price fixing or monopolisation. Therefore, the per se doctrine heralds a relatively certain, although perhaps rather formal, prohibition of particular sorts of economic arrangements, whilst the rule of reason ushers in wide discretion as to what constitutes the public interest and competitive performance respectively. There is no easy demarcation of the respective warrants of the per se doctrine and the rule of reason because each, in its own way, stems from and claims heritage in the

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(16) Chief Justice Hughes: *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 - 360 (1933).



Sherman Act. For example, Louis B. Schwartz, argues that the Sherman Act appears to state that all restraint of trade is illegal and, therefore, should be prohibited.<sup>(17)</sup> The courts interpretation, however, tended to restrict the applicability of this prohibition to undue or unreasonable restraints of trade. This is particularly true of the celebrated Standard Oil and Tobacco cases of 1911. Here, the Standard Oil Company of New Jersey and about seventy other corporations and partnerships had been charged with conspiring in restraint of trade and commerce. This conspiracy stemmed from the original collusion of J.D. Rockefeller, W. Rockefeller and H. Flagler in, or about, the year 1870 and involved a number of practices. For example, rebates preferences, and other discriminatory practices in favour of the combination by railroad companies; restraint and monopolisation by control of pipe lines and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates in oil; the division of the United States into districts so that competition would be entirely eliminated and so on.<sup>(18)</sup>

In 1907 the court decided in favour of the United States and against, respectively, seven individual defendants, Standard Oil (New Jersey), thirty six domestic companies and one foreign company.

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(17) Louis B. Schwartz, General Dissent to Attorney General's National Committee to study Anti-trust Laws (1955) p. 391, op cit.

(18) Standard Oil Company of New Jersey, et al v. U.S. 221 U.S. 1, 273, 344, 509, 43.

Thus, thirty eight companies were held to be parties to the combination entered into in 1899 in restraint of trade, which was also held to be in violation of section 2. of the Sherman Act as an attempt to monopolise. The Supreme Court upheld this decision in 1911 and affirmed considerable relief (divestiture) but, nevertheless, qualified the meaning of sections one and two of the Sherman Act. Chief Justice White enunciated the pertinent opinion to the effect that only undue restraints of interstate or foreign trade or commerce are prohibited by sections one and two of the Sherman Act. Justice Harlan responded, in a partial dissent, that this presumably meant that the defendants could from then on continue to restrain commerce provided that they were reasonable about it and that they took care to ensure that any such restraint was not undue. The meaning of the Sherman Act was thus contested even within the Supreme Court but the so called rule of reason, nonetheless, eventually emerged as the more orthodox interpretation. Likewise the judgement in the U.S.A. v. American Tobacco Company affirmed that 'only acts, contracts, agreements, or combinations which operate to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of their evident purpose, injuriously restrain trade, fall within the condemnation of the Sherman Act'.<sup>(19)</sup>

For the most part, the decisions of the court in this initial period appeared to demonstrate that certain restrictive practices of large combinations could not be stopped because of a de facto interpretation according to the rule of reason. It is often argued,

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(19) United States of America v. American Tobacco Company  
221 U.S. 106. No. 118 (1911) S.3.

accordingly, that the Clayton Act of 1914 was designed with the express intention of making mergers, tying agreements, exclusive dealing and price discrimination illegal per se, wherever their effect may be to significantly limit competition. Ostensibly at least, this constituted a shift toward the per se doctrine, particularly in view of the quite explicit rejection of widespread economic investigation of circumstance as inappropriate. Thus, Walter Adams wrote: "The Clayton Act is a prohibitory, not a regulatory statute. By its enactment, Congress did not intend to authorise the courts or the (Federal Trade) Commission to determine whether particular mergers are good or bad or in the public interest. Instead, Congress acted on the presumption that a substantial foreclosure or elimination of competition was in itself a derogation of the public interest".<sup>(20)</sup> But the Act still left considerable discretion as to what constituted a substantial lessening of competition. Conversely, it has been argued that the effect of the Clayton Act was to lead to a reinterpretation of certain restraints of trade specified in the Sherman Act as illegal per se. For example, agreements to fix or influence prices, divide markets or arrange boycotts. Whereas under certain circumstances, mergers could be justified, price fixing was apparently illegal per se. Accordingly, A.E. Kahn has argued that there has always been a double standard in the anti-trust laws, in that, restrictive agreements between separate firms are treated more severely than proprietary consolidations enjoying the same and even greater market power.<sup>(21)</sup>

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(20) Walter Adams; 'Attorney General's National Committee to Study Anti-trust Laws' (1955) op cit. p. 127/8.

(21) Kahn, A.E. (1953) 'A Legal and Economic Appraisal of the "New" Sherman and Clayton Acts', The Yale Law Journal, 63 (3) pp. 293 - 347.



Arnold, has gone further and suggested that anti-trust legislation actually encouraged capital centralisation because it led to the replacement of 'soft' combinations (collusion, conspiracy) by 'hard' combinations (concrete mergers).<sup>(22)</sup>

The history of this period of anti-trust legislation is characterised by a more or less explicit contest regarding the meaning of the relevant Acts. Legal historians have indeed dealt with the stages of this contest in considerable detail. For present purposes, however, it is sufficient to demonstrate that there was some sort of contest between two quite general interpretations. On the one side, there was a general approach which apparently made no reference to any sort of economic gestalt and, on the other, an approach which assessed 'intent' in relation to economic performance, efficiency and so on.

In relation to the issue of legal and economic interpretations of anti-trust legislation and, in particular, their respective concepts of monopoly, the work of Eugene Rostow and E. S. Mason is especially important. For example, E. S. Mason seems to be arguing the conventional thesis that legal and economic interpretations of monopoly and hence of anti-trust legislation are distinct if not wholly incompatible. Whereas 'law' is concerned to establish and prevent specific limitations upon competition, 'economics' is more likely to address itself to questions of market power and control of the market. In this respect it is significant that, for law, the appropriate antithesis is between monopoly and free competition and, for economics, the relevant distinction is between monopoly and pure competition. Free competition is defined as a situation in which

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(22) Arnold, T. (1937) 'The Folklore of Capitalism' New Haven: Yale University Press.



no actual or potential competitor is limited in his action by the agreement or harassing tactics of large rivals. Pure competition, on the other hand, is a state of the market whereby no buyer or seller can unilaterally influence the price of goods bought and sold. As Mason puts it, lawyers are preoccupied with rules whereas economists are addicted to models. The difference is real and it should be remembered that monopoly as such has never been illegal under the terms of anti-trust legislation. On the contrary, law has tended to direct itself at the abuse of market power rather than at market power per se. The difference is also pertinent, having a number of specific effects upon the interpretation of anti-trust legislation. These effects will be described later. The difference between legal and economic approaches, however, is much more important than it would first appear, for it underlies the far more basic issue of the purpose of anti-trust legislation. As we shall see 'legal' and 'economic' interpretations of 'monopoly' are often associated with radically different policy objectives.

Why then is Mason's work relevant to the discussion of the nature of anti-trust legislation? He argues that even in its earliest 'common law' days law was more concerned to establish the existence of a monopoly because of the existence of a conspiracy or due to the exclusion of other competitors. This preference was exercised over and against the idea that monopoly was to be found in the 'control' of the market. For example, Mason states that "... whatever are considered to be the evils resulting from monopoly - enhancement of price, deterioration of product, or the like - a monopolistic situation, or an attempt to monopolise, is evidenced to the courts primarily, if not exclusively, by a limitation of the freedom to compete. The original meaning of monopoly, an exclusion of others from the market by a sovereign dispensation in favour of one seller,

has continued to mean exclusion, in the broad sense of restriction of competition ..... (he goes on) ..... there has been a growing tendency to declare every contract between competitors which restricts competition unenforceable and, since the Sherman Act, illegal, whatever the extent of the control made possible by the contract. In the case of mergers the monopoly or attempt to monopolise is discovered primarily in predatory practices designed to hamper the competition of outsiders and not in control of the market". (22a) Thus, for law, monopoly means the restriction of the rights of others to compete through the use of restrictive or abusive practices. Economics, however, holds monopoly to consist of the simple control of the market. From this simple distinction between the two Mason goes on to assert the superiority of an 'economic' approach to the problem of monopoly. This superiority depends, in part, upon the implicit suggestion that the market may be controlled in ways which escape legal sanction, although far more important is the way in which such an approach is more effective because it is more selective. A properly constructed economic appraisal would be able to ascertain the 'real', that is the economic concept of, monopolistic situations. Accordingly, the 'economic' interpretation is clearly counterposed to the 'legal' notion of monopoly on the grounds that economics is superior to law in this respect at least. Whereas law is seen as a blunt instrument, 'a standard of evaluation in the judgement of public policy', economics is regarded as a finely tuned tool of analysis. (22b)

In order for Mason to argue this superiority he would have to

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(22a) Mason, E. S. (1957) 'Economic concentration and the monopoly problem', p. 344/5, Cambridge: Harvard U.P.

(22b) Mason, E. S. (1957) ibid p. 333.

demonstrate that economics is more successful in assessing monopoly than law. Not only does Mason admit that economics is no better than law in this respect but where he does insist upon the inherent superiority of an 'economic' approach the argument is entirely circular: economics is better at regulating monopolistic situations because it has an economic concept of monopoly as 'market power'. Furthermore, this concept of market power is itself equivocal. First of all, Mason openly acknowledges that - "As a firm grows, transactions that could conceivably be organised through the market's price mechanism are transferred to the administrative organisation of the firm".<sup>(22c)</sup> In other words there is a basic difference between the market, which involves 'bargaining transactions among legal equals', and the corporation, which encompasses 'managerial or rationing transactions involving the relations between administrative superiors and inferiors', and this difference is eclipsed with the growth of the corporation.<sup>(22d)</sup> This may be all well and good as a description of how the corporation absorbs some of the functions of the market but what sense does it make to then go on and talk about the market power of particular corporations as if the market and the corporation are separate spheres! Secondly, and this is perhaps a similar point, Mason concedes that .. "firms are not undifferentiated profit maximising agencies which react to given market situations in ways which are independent of their organisation".<sup>(22e)</sup> But if the corporation is a complex administrative unit does this not mean that the very concept of market power is attenuated in one very

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(22c) Mason, E. S. (1957) ibid, p. 22.

(22d) Mason, E. S. (1957) ibid, p. 22.

(22e) Mason, E. S. (1957) ibid, p. 62.

important respect in that it discounts the organisational apparatus in favour of a neo-classical conception of the market as an arena in which one can be powerful?

Finally, and in a somewhat later article, Mason admits that his distinction between legal and economic interpretations of anti-trust legislation is overdrawn. He recognises that the degree of market control and business performance in general did influence judges decisions, albeit in ways which remained implicit. He then goes on to argue the far more interesting point that so called 'economic' criteria have been inserted in 'legal' concepts of monopoly and that these have been extended further to encompass considerations normally associated with an 'economic' approach to the issue. The process is both twofold and ongoing. This particular aspect will be discussed later.

So far the argument has been restricted to a rather technical examination of Mason's preference for 'economic' criteria of control and monopoly. It is necessary to ask, however, whether this is really pertinent to a discussion of anti-trust legislation and whether Mason's preference for an 'economic' approach is at odds with the basic structure of anti-trust legislation? The question is important. For example, if anti-trust legislation were merely an attempt to regulate the economy in terms of 'efficiency' and so on then Mason's point would be well made if a little overstated. But it is argued here that anti-trust legislation cannot be reduced to a regulatory apparatus of this kind without generating serious problems concerning the nature of anti-trust law. It is all very well to argue, from the standpoint of economic policy, that competition is good because of its effects and in spite of its consequences, but this needs to be set against the fact that, historically, anti-trust law views competition as an unqualified



good in itself and because it guarantees freedom and democracy. (22f)

This point is quite basic to the argument that anti-trust legislation was above all else concerned with the actual form of corporate ownership which, under certain conditions, generated monopoly. (22g)

Monopoly was to some extent a secondary issue compared with the form of ownership involved namely, the trust. Mason, therefore, confuses the objective of anti-trust legislation with one of its so called 'tests'. As Mason himself points out, anti-trust legislation was never envisaged as a regulatory device designed to use information relating to price, market share and so on irrespective of the formal arrangements by which prices were 'fixed' and market share achieved. Monopoly, in the sense which Mason describes it, was not the primary concern of anti-trust law. To treat it as if it were is to wholly misconceive it in terms of a purely technical response to the 'problem' of monopoly as defined by classical economic theory. Accordingly, he is restricted to measuring the benefits which are assumed to attach to the notion of competition coupled with the more or less vague overture to the concept of the public interest defined in an economic sense.

Overall, Mason's work is interesting for the way in which he approaches the subject and for the manner in which he differentiates

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(22f) This does not indicate an acceptance of the equation of competition and freedom, merely the fact that this equation was seen as central to the existence of anti-trust legislation. For an interesting discussion of, and disagreement with, the logic of equating freedom with competition see Cohen, G. A. (1981) N.L.R 126.

(22g) The point should be made that there is no necessary correspondence between the corporate form and the existence of monopoly but that monopoly cannot be understood properly outwith the parameters delimited by the concept of the 'corporation'.

'legal' and 'economic' interpretations of anti-trust legislation. In treating 'monopoly' as a purely technical problem amenable to administrative regulation, however, he completely misunderstands the basic structure of anti-trust legislation. He even admits as much in the introduction when he concedes that the growth of the corporate form of organisation has 'played havoc with the ideals and possibilities of Jeffersonian democracy' and that the 'techniques of economic analysis are not particularly relevant' to this problem. (22h) Mason does succeed in elaborating some of the ways in which anti-trust law has 'evolved' from a formal apparatus of prohibition into a mere technical device within a general arsenal of administrative regulation. But this does not detract from the more basic point that such a portrait of anti-trust legislation is out of sorts with its original structure.

In the last resort the particular way of regarding anti-trust law cannot be entirely divorced from the manner in which the free-enterprise economy is justified. After all, the supposed defence of free-enterprise is to some extent inseparable from the supposed benefits of that which is being defended. It makes sense, therefore, to examine the question of how the free-enterprise system is justified. E. V. Rostow's work is especially important in this respect primarily for the way in which he emphasises the link between 'democratic freedom' and free enterprise.

There seem to be two distinct but interconnected ways of justifying the free-enterprise economy. First of all, it may be judged in terms of its efficiency and regarded as relatively, if not absolutely, successful - according to criteria concerning output,

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(22h) Mason, E. S. (1957) ibid, p. 15.

prices, wages and so on. Secondly, it can be judged by its capacity to generate or secure democratic liberty. These justifications are sometimes used in tandem and at others in isolation. For example, Rostow clearly recognises the importance of the latter sort of justification in the following statement. "In all its arrangements, American society manifests a preoccupation with the problem of power. Persistently, almost instinctively, its policy is always to avoid concentrations of authority as a threat to the possibility of freedom. Capitalism stands with federalism, the separation of powers, the disestablishment of religion, the anti-trust tradition, the autonomy of educational bodies, and the other major articles of the American creed, in expressing a deep suspicion of authority".<sup>(22i)</sup> Although at the same time he tends to dispute the idea that there is an exclusive relationship between laissez-faire Capitalism and efficiency when he states that there is no logical reason why the state cannot organise production on an efficient basis. Mason, on the other hand, whilst accepting the importance of justifications from the standpoint of political liberty, seems to discount their force and relegate them to a bygone age of Jeffersonian democracy. Indeed the entire thrust of his work confirms his preoccupation with the former sort of argument from 'efficiency'. As we have seen the difference between the two sorts of justifications is important for a proper analysis of anti-trust legislation.

Whatever the particular merits of economic and judicial interpretations of anti-trust legislation, (and the discrete

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(22i) Rostow, E. V. (1959) 'Planning for Freedom'  
New Haven: Yale U.P. p. 43.

justifications which often underscore them) there is a readily definable difference between primarily legal and essentially administrative forms of Regulation. To be sure anti-trust legislation is 'administered' - and the role of the Federal Trade Commission and the anti-trust division of the department of justice are significant institutional forms of administration - just as administration of the economy may take a legal form. But the important point to recognise is that anti-trust law was primarily and unequivocally wedded to the prevention of specified limitations upon competition which, if left unchecked, would subvert democratic freedom. Therefore, the 'libertarian' justification of free competition clearly and unambiguously underpinned the anti-trust tradition. On the other hand, more contemporary issues of regulation, which derive in part from a particular way of interpreting anti-trust law, take as their point of departure the administrative canon of efficiency. The economy is seen in terms of models which generate certain effects which can be 'mapped' onto the performance of the actual economy in the interest of defining the degree of realisation of public goals. Accordingly, whereas anti-trust law was originally concerned with the justification of free competition because it was viewed as a necessary bastion of democratic freedom and individualism, Administrative regulation is more concerned with the 'economic' justification of free competition on the grounds of its efficiency in terms of growth, price, opportunity, flexibility and so on. The difference is not absolute in any historical sense for the two ways of looking at anti-trust law have intersected in a number of ways. Indeed it can be argued that there has been a variable relationship between the two in which legal concepts may be qualified by so called 'economic' criteria and 'economic' considerations inserted into legal doctrines of intent, conspiracy



and so on. Nevertheless, the fact that the actual course of the anti-trust tradition meandered between typically legal and economic interpretations does not in the end detract from the argument that the strategic ends of the statute were originally linked indissolubly to questions of political liberty.

An example of the interrelation of legal and economic 'concepts' occurs, for Rostow, in the rigorous inference of intent from economic power irrespective of the practices whereby such power was acquired. His argument is twofold. Not only would such a process of inference serve to achieve at least some of the strategic ends of the Sherman Act but he argues that since a number of landmark decisions in 1948 - Paramount, Schine and Griffith - these ends have been achieved.<sup>(22j)</sup> It will be argued later that the issues of 'power', 'purpose' and parallel response are both difficult and openly contested within the anti-trust tradition and that Rostow's interpretation of the developments in 1948 are at best equivocal. Nevertheless, following the logic outlined by Rostow, if intent could and should be read off from the mere existence of economic power this clearly privileges the evidence pertaining to economic power and especially the market to which that power was supposed to refer. As with Mason's argument, this would entail a considerable shift from the original aims of anti-trust legislation by privileging 'economic' interpretations of monopoly over legal concepts of freedom from interference. More importantly, there is no reason to suppose that this approach would be any more successful in combating monopoly nor the corollary - that law is hampered by its failure to embrace economic tests of monopoly 'power'. For example, it can be argued that a reliance upon 'economic' definitions of the market and market power would provide, in Walter

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(22j) Paramount Pictures v. U.S., 334 U.S. 131 (1948)  
Schine Chain Theatres, Inc. v. U.S., 334 U.S. 110 (1948)  
U.S. v. Griffith, 334 U.S. 100 (1948).

Adam's words, a cornucopia of escape hatches for there are innumerable ways of defining the relevant market and an infinite number of constructions of economic 'power'.

There is a final sense in which the distinction between economic and legal concepts of monopoly may contain within it some indication of the quite limited role of 'law' in combating monopoly. For, if monopoly, industrial concentration, oligopoly and the like are inevitable in some way or other then the very idea that 'law' can limit their growth is facile in the extreme. Of course much depends upon how regulation is looked at. If it is merely an attempt to police the unacceptable effects of modern industrial society - whether these are perceived against a moral backcloth of 'good' business conduct or against an economic model of efficient allocation of resources - then regulation may be possible in the quite limited sense of the word. If, on the other hand, regulation refers to the way in which industrial society is organised and to the elimination of the consequences of such organisation upon the possibility of independent democratic and entrepreneurial freedom then in being limited regulation is rendered quite useless. Which sort of regulation is held to inform the strategic ends of anti-trust legislation is basic to any assessment of the viability of such regulation.

It is argued here that the aims of anti-trust legislation were quite specific and involved an attempt to prevent the growth of a form of ownership deemed to be an anathema to democratic society. The pioneers of the anti-monopoly movement and anti-trust legislation were loath in the extreme to recognise the inevitability of the corporate form and yet both Mason and Rostow seem to accept some sort of inevitability of oligopoly or industrial concentration as quite natural, and merely seek to regulate its

unacceptable consequences. Their commitment to the idea of inevitability is not entirely unequivocal. For example, there are perhaps three different ways of arguing that the inevitability of 'oligopoly' and so on renders legal regulation ambiguous. In the first and the strongest sense, it can be stated simply that if monopoly is inevitable then controls are useless. It is seldom stated as baldly as this and is usually concealed within some statement referring to monopoly as the logical result of free competition and, therefore, controls can at best mitigate its worst effects. Secondly, as Mason argues, if the corporation is fundamental to social life then to touch it deeply is to disturb fundamental social processes. Therefore, regulation can only be marginal.<sup>(22k)</sup> Not only does this discount the role of history in terms of how the corporation came to be fundamental but it also seems to regard the strategic ends of anti-trust legislation in the future anterior. Thirdly, E. V. Rostow makes the point that criminal convictions cannot restructure industrial society and, therefore, administrative regulation is more appropriate. This point is quite typical of the so called advocates of 'structural' remedy but they seldom consider that these sorts of remedies involving dissolution or simple reduction in the size of the operating units does not, of itself, destroy the corporate form upon which any restraint of trade or monopoly may depend. Furthermore, Rostow's laudatory review of the history of anti-trust enforcement would leave one to doubt his assertion that it has been a history of relative success. This point will be discussed later.

Over and above the specific problems encountered by each of these arguments concerning the inevitability of some sort of

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(22k) Mason, E. S. (ed.) (1959) 'The Corporation in Modern Society', Cambridge: Harvard, U.P. p. 2.

industrial concentration or centralisation there is a degree to which they miss the point. For example, insofar as it has been argued here that the issue of monopoly is inseparable from that of ownership then the inevitability of monopoly, such as it is, is indissolubly wedded to the inevitability or otherwise of the corporate form of ownership. But it has been argued that the corporate form of ownership is not an inevitable outgrowth of laissez-faire ownership. If this is correct it follows, therefore, that monopoly is not inevitable nor is industrial concentration and so on. If this is the case then any limitations of 'law' cannot depend upon the inevitability of that which it is supposed to control or prevent - monopoly and so on - but must refer to the basic structure of anti-trust legislation.

Mason is clearly unhappy concerning the thesis of inevitability. For example, he evinces a healthy disdain for the concept of 'monopoly' capitalism and argues against the idea that industrial concentration is increasing. First of all, he cites the existence of four million independent business units as a countervailing force both to the argument of inevitable or increasing concentration and to the unbridled extent of corporate power.<sup>(221)</sup> Secondly, he states that there is no evidence that concentration has been increasing. Clearly the two are separate in that concentration may be inevitable but not increasing nor yet total. It is also unclear who Mason has in mind. Whilst Berle and Means did espouse a notion that industrial concentration was increasing it can be argued that the factual basis of concentration is less important than the organisational strategies by which production is conducted. These strategies may subsume so called independent business units and subvert their incipient status as a countervailing power without any visible sign of concentration or centralisation.

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(221) He uses figures from 1946.



The thesis of industrial concentration - whether inevitable, increasing, omnipotent or whatever - is perhaps beside the point. Despite reservations about the direction of industrial concentration Mason still retains an implicit conception of the inevitability of oligopoly. For example, he recognises that technical and organisational influences may decree oligopoly and, following Schumpeter, that this may be a necessary condition for an effective technological spur to 'real' competition from new products, processes and so on. Therefore, whilst he denies that concentration has been increasing inexorably he accepts that some sort of oligopoly is inevitable and even beneficial.

It has been argued in this section that whilst there is a substantial difference between 'legal' and 'economic' interpretations of anti-trust legislation and, more especially, in their respective conceptions of 'monopoly', the distinction is often overdrawn. It is true that the two may herald different sorts of regulation but the connection with one or other heritage is by no means clear cut. Moreover, it is suggested that any greater emphasis upon primarily 'economic' factors would lead neither to more effective regulation nor would it help to attain the strategic ends of the Sherman Act. Indeed the reverse is the case for greater attention to economic criteria of monopoly would belie the proper and original purpose of anti-trust law. Finally, it is argued that the major limitation of law in respect of the regulation of 'monopoly' consists in the manner in which 'law' conceives of the corporation. The corporation is not seen as an inevitable outgrowth of laissez-faire society, nor is it viewed as a peculiarly 'economic' concept beside which 'law' is hopelessly inadequate. On the contrary, it is the way in which law perceives ownership and the concepts which are utilised to combat certain forms of ownership which are at the root of the problem. Anti-trust law would not be strengthened by a greater interjection

of 'economic' forms of measurement, it would merely be diverted from its true aim.

### Discretion.

There may be a temptation to read the contest between so called 'legal' and 'economic' interpretations of anti-trust legislation in terms of the infringement of fixed and determinate concepts of law by the wholly alien concept of discretion. Not only is the issue more complex than this reading would allow but there is a sense also in which discretion is inherent in law as such.<sup>(23)</sup> Therefore, discretion would appear to be somewhat limited as a means of distinguishing the respective claims of the rule of reason and the per se doctrine. On the contrary, in fact the distinction resides in the sort of criteria by which discretion is exercised rather than in the relevance of discretion itself. For example, the rule of reason makes the

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(23) Pepinsky, H. E. (1976) 'Crime & Conflict' London: Martin Robertson.

entire business history of the defendant a relevant topic for consideration by the court. Likewise, there are an almost infinite number of mitigating factors which may 'allow' considerable latitude: the existence of good/bad intentions behind the restraint of trade; the economic consequences of decreeing divestiture or dissolution on the industry in general; the political, military and 'imperial' importance of the defendant and, the essentially contestible nature of expert economic testimony. All of these items may have a bearing on the eventual outcome according to an interpretation in line with the rule of reason. Insofar as anti-trust legislation is governed by the rule of reason, then anti-monopoly policy would seem to be conducted with a view to preserving the benefits incidental to the existence of free competitors. It is perhaps significant that Eugene Rostow makes the following comment, "orienting the law around this central axis - the concept of limitation on competition in defined markets - we conclude that by and large our anti-trust law is adequate to its task".<sup>(24)</sup> Any practical assessment of the degree of limitation of competition, therefore, is subject to a number of factors which may be held to mitigate the limitation to a significant degree. For example, the way in which the market is defined may result in the balancing of the limiting effect by other factors incidental to competition; technology, performance, efficiency, purpose and so forth. This much indicates that the rule of reason approach is clearly associated with regulating the complex equation between the assumed benefits of competition, on one side, and the existence of abuse, on the other. It is a regulatory and administrative response to the concrete development

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(24) Rostow, E. (1955) Partial dissent to Attorney General's National Committee to study the Anti-trust laws. op cit. p. 389.

of the free enterprise economy.

The sort of discretion which attaches to the per se doctrine is altogether different. This doctrine is aimed at the formal prohibition of certain acts or market situations in themselves and would appear to be markedly fixed rather than flexible. Nevertheless, the pre-eminence of the concepts of conspiracy and intent involves a measure of discretion in the attachment of authors to any conspiracy in restraint of trade and to the specific intent to monopolise trade. This is particularly true of the Sherman Act discussed below. To be sure, the per se doctrine may seem to bite much harder on 'anti-competitive' behaviour than does the rule of reason, but the reliance upon essentially legal criteria means that the issue of legal regulation of economic affairs is posed even more starkly.

#### The Sherman Act.

The Sherman Act comprises two quite basic sections. Section one states that, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Section two states that, every person who shall monopolise or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. Moreover, section three states that, every contract, combination or conspiracy in restraint of trade is illegal in itself and section eight makes it clear that 'person' or 'persons' includes corporations and associations. On the face of it this would seem to provide persuasive evidence



for a per se approach to anti-trust legislation. The particular warrant for the encroaching popularity of the rule of reason is to be found in the use of the common law to 'interpret' the underlying meaning of the Sherman Act. This is especially true of the judicial construction of Chief Justice White in the Standard Oil case described above. Although it is equally clear that section one of the Sherman Act still depends upon the concept of conspiracy and that section two points up the importance of the concept of intent; in this sense the twin concepts of conspiracy and intent are important supports of the Sherman Act irrespective of any particular construction thereof.

#### Conspiracy.

So far as anti-trust legislation is concerned the concept of conspiracy has two main referents: intra-enterprise conspiracy and inter-enterprise conspiracy. Intra-enterprise conspiracy refers to the fact that the corporation can conspire with itself in three ways. First of all, it is entirely plausible that a corporation, as a legal subject, may conspire with officers acting on its behalf or, again, a conspiracy may be formed between the officers who comprise the corporation. Secondly, a 'parent' corporation may conspire with its subsidiary corporations or else a number of subsidiaries may conspire with each other. Finally, intra-enterprise conspiracy includes the possibility that a person or persons (including corporations) may own stock in two or more separate corporations and can, therefore, form the basis of a conspiracy between them. Each conspiracy refers, of course, to some definite restraint of trade or attempt at monopolisation. It is quite clear that each form of intra-enterprise conspiracy

depends upon the identification of certain subjective predicates of the corporation. This much holds whether these predicates are condensed as the corporate subject, dispersed to discrete representatives of the corporation (its officers in other words) or else exercised by stockholders. In each case the accurate specification of these predicates is absolutely essential to the finding of a conspiracy. This is also the case for inter-enterprise conspiracy. Quite simply then, conspiracy requires certain subjective supports capable of conspiring. Insofar as the corporation itself is viewed as an active agent of the conspiracy then it is as a subjective conspirator. If, on the other hand, corporate personnel are involved then it is in their capacity as bearers of the corporate subject, specific supports of the predicates of the corporate essence. That is to say, in their role as corporate personnel (managers) or title holders (stockholders) and not in their capacity as free individuals.

The importance of the corporate role is often crucial. As Stone remarks, "... the law goes even beyond demanding proof of wrongdoing of any corporate agent, and insists on a connection (proved by a preponderance of the evidence) with someone fairly high up in the corporate hierarchy".<sup>(25)</sup> Therefore, there is a clearly delineated attempt to penetrate to the heart of the corporate essence, insofar as it is to be found in certain key guardians, namely, top management. The attempt is far from successful - for example, the Delaware Supreme Court made the following comment: "... it appears that directors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put

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(25) Stone, Christopher (1975) op cit. p. 53.

them on suspicion that something is wrong. If such occurs and goes unheeded, then liability of the directors might well follow, but absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists".<sup>(26)</sup>

Insofar as there is a tendency to 'insulate' top management from the unacceptable face of corporate activity, on the grounds that they cannot be held responsible for what they don't know (Stone) and, given that there is a fundamental cleavage between possession and control relations, then this particular strategy is perhaps less than successful in fixing corporate responsibility to identifiable authors.

Section one of the Sherman Act clearly requires a plurality of actors, a convocation of co-conspirators, before it can be violated. Therefore, the Act depicts the corporation as a subject or, as an aggregate of subjective predicates. This follows because the Sherman Act does not proscribe restraint of trade as such but only every contract, conspiracy or trust in restraint of trade. Moreover, restraint of trade cannot be a substantive offence, under the provisions of the Sherman Act, with the result that some form of identifiable collusion between separate actors is essential for a successful prosecution under section one of the Act. It is commonly understood that if a corporation commits a substantive offence then the agents of the corporation responsible for the perpetration of the crime are guilty of conspiracy. It does not follow, however, that restraint of trade by a corporation implies a similar conspiracy between discrete 'layers' of the corporate

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(26) *Graham v. Allis-Chalmers Mfg. Co.* 188 A.2d 125, 130 Del. (1963), Quoted in Stone *ibid.* p. 63.



hierarchy. In short, it is by no means clear that a corporation can conspire with itself in restraint of trade and in violation of a section one offence. This doubt would seem to be borne out by the fact that by 1955 there had been no recorded decision in favour of a section one charge of intra-enterprise conspiracy by a corporation and its officers. In over sixty years not one charge succeeded unless it was accompanied by other charges and accompanying evidence of overt conspiracy in restraint of trade.

Section two offences are rather different since monopolisation is a substantive offence with the result that corporate personnel can be found guilty of a conspiracy to monopolise trade. Likewise, conspiracy between subsidiaries, or between a subsidiary and the parent company, and a conspiracy resulting from commonly held title to the stock of discrete corporations, can be upheld as section one offences. Thus the courts held that, "The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, an affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which congress has imposed. The corporate interrelationships of the conspirators .. are not determinative of the applicability of the Sherman Act".<sup>(27)</sup> A very clear statement which seems to mark out an extremely far reaching role for the Sherman Act. Nevertheless, this potency is predicated upon the concept of conspiracy. As we have seen the concept of conspiracy would appear to dissolve the relevance of corporate interrelationships and, arguably, the only

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(27) United States of America v. Yellow Cab. Co. 322 U.S. 218 (1947) 227.



secure basis for any form of regulation. Instead, restraint of trade by corporations is viewed entirely as a matter of conspiracy between distinct actors. Even if the provisions of anti-trust legislation are interpreted strictly, in a way which enables law to bite hard on anti-competitive behaviour, then the attempt is perhaps unnecessarily restrained by the conceptual equipment available, respectively, conspiracy and intent. Further, when the concept of conspiracy depends upon the existence of some sort of boundary between a parent and a subsidiary company, or between subsidiaries or between a corporation and its executive officers, then the picture of corporate interrelations implied therein merely confirms the inadequacy of law as an agency of regulation.

The discussion of intra-enterprise conspiracy highlights the difficulties involved in conceiving of the corporation as a subject in its own right as well as viewing it as an aggregate of discrete subjective attributes. These difficulties are compounded when law attempts to describe the basis of a conspiracy between one or more permutations of these respective 'subjects'. It is with regard to inter-enterprise conspiracy, however, that the potentiality of law as a regulatory agency faces a more important test. Inter-enterprise conspiracy involves what has come to be known as the issue of 'conscious parallelism'; the idea that companies may pursue a parallel course of action without recourse to an overt conspiracy. This course of action may include such items as pricing policy, output level, market share and so on. Conscious parallelism is so called because it involves two aspects; first, a knowledge of 'competitors' conduct and, secondly, uniformity of business behaviour or, what amounts to the real manifestation of a suitable synonym for collusion. This particular issue penetrates to the heart of anti-trust policy since it raises the question of

whether conspiracy can be 'read off' from the presence of economic effects normally indicative of overt collusion or, conversely, whether an active conspiracy, a genuine meeting of the minds, is essential for the finding of conspiracy under the anti-trust laws. A question which appears to crop up again and again, therefore, is 'should law bite on uncompetitive situations without being restricted by rigid legal concepts.'<sup>(28)</sup>

Interpretation of inter-enterprise conspiracy is far from uniform. For example, in 1948 the Federal Trade Commission announced that, "... when a number of enterprises follow a parallel course of action in the knowledge and contemplation of the fact that all are acting alike, they have, in effect, formed an agreement".<sup>(29)</sup> An interpretation which had been upheld by the Supreme Court in the same year to the effect that concerted action constituted a combination within the meaning of the Sherman Act.<sup>(30)</sup> On the other hand, the Supreme Court made the following declaration in 1954, "But this Court has never held that proof of parallel business behaviour conclusively establishes agreement or, phrased differently, that such behaviour itself constitutes a Sherman Act offence. Circumstantial evidence of consciously parallel behaviour may have made heavy inroads into the traditional judicial attitude toward conspiracy but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely".<sup>(31)</sup>

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(28) Neale, A. (1966) op cit.

(29) Federal Trade Commission, Notice to the Staff: In Re: Commission Policy toward Geographic Pricing Practices (Oct. 12, 1948).

(30) Federal Trade Commission v. Cement Institute, 333 U.S. 683, 716n 17, (1948).

(31) Theatre Enterprises Inc. v. Paramount Film Distributing Corp. et al 346. U.S. 537, 541 - 542, (1954).

To be sure, the implied dispute is between two rather fragile contestants. Indeed, as Rostow remarked, a case of purely tacit or conventional collusion, that is, devoid of such additional evidence as formal/informal understandings, policing measures, correspondence, and so on has never reached the courts.<sup>(32)</sup> Moreover, Neale indicates that 'reading off' collusion from the mere existence of economic effects indicative of parallel action is largely restricted to a charge under Section 5 of the Federal Trade Commission Act.<sup>(33)</sup> That is to say, as an alternative means to prevent the continuation of a tacit agreement after conspiracy is established by more conventional (legal) means. Any inclusion of a comprehensive analysis of the economic effects of a restraint of trade is thereby subordinated to the primary finding of an overt conspiracy in the normal (legal) manner. Accordingly, conscious parallelism is restricted to secondary relevance. By the same token there had been no primary charge relating to individual sellers following the lead of a more 'powerful' competitor, that is, in the absence of any separate agreement or conspiracy established at law.

There is a rather perplexing array of opinions on the early interpretation of 'conscious parallelism'. In this sense Neale provides a useful summary of the position. He argues as follows: agreement or conspiracy in restraint of trade can be proved conclusively by circumstantial evidence, 'so long as a chain of evidence can be built up for which the only plausible explanation

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(32) Eugene v. Rostow et al. AGNCAT (1955) op cit. pp. 40 - 42.

(33) Neale, A. (1966) op cit. p. 94.



is a common understanding or plan'. That much is established at law. Anti-trust law, however, knows no doctrine of 'constructive conspiracy'. That is to say, 'the existence of a restrictive agreement cannot be proved simply by showing that the effects usually associated with such an agreement have occurred'. A great deal of discretion exists between these two interpretations of the basis of a conspiracy. But conspiracy still requires a genuine meeting of the minds. Accordingly, it is often suggested that the best form of defence to a charge of conspiracy would be to offer a plausible alternative interpretation of parallel action rather than to challenge the fact of parallel action as such.

At bottom the issue of conscious parallelism involves the more general contest between those who would view the impairment of competition as actionable per se and those who would rather restrict anti-trust legislation to the apparently rigid concepts of conspiracy and intent. Obviously, in order to rely on the impairment of competition per se as a criterion of illegality, it is necessary to countenance an exhaustive analysis of the consequences of particular actions in the light of some model of perfect or workable competition. It is not just a matter of outlawing price fixing per se, since the whole essence of conscious parallelism involves a detailed assessment of the market in order to even define parallel action and thence to infer an implicit conspiracy. Therefore, this sort of 'strict' approach is characterised by a basic concern for the regulation of competition and the preservation of a series of benefits which, it is assumed, adhere to free competition; growth, efficiency and adaptability. As such this response ceases to be a distinctly legal regulation of economic affairs becoming instead a bureaucratic response to the free enterprise system.

To some extent this bureaucratic administrative response describes



the role of the Federal Trade Commission in its dealings with the problem of restraint of trade. Whilst this sort of perspective may have left a few high tide marks inscribed in the history of anti-trust legislation, nevertheless, it has not achieved any deeper resonance within anti-trust legislation.

For example, the *Milgram v. Loew* judgement ruled that consciously parallel practices demonstrated the existence of a conspiracy. Also, this approach to some extent replaced the 'meeting of the minds', deemed essential for the finding of conspiracy in earlier interpretations, with the notion of a constructive conspiracy. Although on appeal certain reservations were entered along with a wholesale dissent. In effect the Appeal Court argued that parallel action was still insufficient by itself but that in the absence of an attempt by the defence to put forward a plausible alternative interpretation it was sufficient in this particular case.<sup>(34)</sup> At most, this sort of response has appeared as an adjunct to a properly constructed legal appraisal of economic affairs and, therefore, has been subordinated to the dictates of legal concepts like conspiracy and intent. For example, the *Rigid steel conduit* case, often quoted as a landmark in the rigorous pursuit of parallel action, in fact involved only a secondary charge under Section 5 of the Federal Trade Commission Act abutting a primary finding of conspiracy and aimed at preventing its 'renewal'.<sup>(35)</sup> Furthermore, even if this response advocating 'constructive conspiracy' constituted

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(34) *Milgram v. Loew's Inc.* 192 F. 2d 579, 583 (3rd Cir. 1951) and 343 (U.S.) 929 (1952).

(35) *Triangle Conduit & Cable Co. Inc. et al. v. Federal Trade Commission*, 168 F. 2d 175 (48) and 336 U.S. 956 (1949).

the prevailing interpretation, then the attendant reliance upon economic consequences would divert attention from the issue of economic ownership and thus would change the nature of anti-trust legislation entirely. It would make relevant a potentially infinite number of essentially contestible economic variables prior to the assessment and balancing of matters incidental to the existence of free competitors. Hence all that anti-trust legislation could achieve, on this reading of it, would be the regulation of abuse within an overall framework of oligopoly designed to meet certain criteria of 'performance' rather than prevent monopoly. The issue of industrial concentration and centralisation would be relevant only insofar as they impeded or increased 'performance'. Therefore, the opportunities for the defence of restraint of trade, on the grounds of technological or strategic importance, efficiency and so on, would be potentially boundless and the scope of law at best uncertain and at worst secondary.

The crucial argument is not between the sort of general approach which would abandon legal concepts, in an attempt to foreclose monopolistic effects, and the strict criminalisation of corporate activity. Nor is it between the greater exercise of discretion and the more rigid imposition of legal sanctions. Both sorts of response overlap to some extent and each is flawed in very specific ways. Over and above these particular problems, what is important is that these two quite general responses supply the paradigm for legal regulation. That each is based on certain fundamental, although quite unacceptable, assumptions goes a long way toward explaining the comparative difficulties encountered by legal and bureaucratic forms of regulation. If these twin forms of regulation overlap then the problem of priority becomes apparent. As we have seen the evidence of the earlier part of the development of anti-trust

legislation resolves this dilemma by inserting 'economic' criteria within sharply delineated legal concepts. Thus, intent may be read off from the existence of certain consequences and a conspiracy may be 'constructed' by reference to market behaviour. Accordingly, the denegation of corporate structure, inherent in the conventional analysis of competition, is compounded by being absorbed within a form of legal analysis which views corporate structure in terms of a subjective essence and sees criminal action as the responsibility of individual authors.

As we have seen, the concept of conspiracy in restraint of trade characteristic of section one of the Sherman Act indexes the notion of a subjective agreement between conspirators and also demarcates discrete corporate spheres capable of entering into a conspiracy as co-conspirators. Accordingly, the charge of conspiracy requires the specification of actors who are in fact authors of the conspiracy. Insofar as the charge derives from the Sherman Act, then these parts are played either by the corporate subject itself or by identifiable bearers of the predicates of the corporate subject, corporate personnel in other words. The Sherman Act quite clearly specifies that person or persons can include (legal) corporations. Further, if restraint of trade is to be defined then the criteria by which it is to be assessed are admitted only as an adjunct of the concept of conspiracy. Restraint of trade is not an offence per se but requires a conspiracy to activate the process of legal sanction. Considerable problems attend the specification of the corporation as an economic subject or as a constellation of economic actors. Additionally, the concept of any sort of equilibrium between free producers and consumers, through free exchange in the market, is a less than accurate portrayal of the corporate economy. Therefore, the concepts of restraint of trade and conspiracy are inappropriate



regulatory mechanisms. This much becomes plain with regard to their separate capacities, but when each is taken in tandem with the other then the possibility of effective legal regulation of economic affairs recedes into the background.

#### The Concept of Intent and Corporate Agency.

Section one of the Sherman Act depends upon the identification of a conspiracy in restraint of trade. Similarly, section two of the Act is sustained by an equal reliance upon the concept of intent. Monopoly per se is not illegal. What is illegal is the monopolisation of trade. This special offence of monopolisation involves two distinct aspects: first, monopoly, which is defined as the 'power' to fix prices or exclude competition and, secondly, a deliberate use of, or attempt to preserve or acquire, such power. Hence, the conventional contraction of these two aspects as 'power' and 'purpose'. Therefore, the concept of intent is essential for the finding of a charge under section two. The concept of intent implies two component parts: first, specific criteria of guilt, because the Sherman Act is after all a criminal statute, and, secondly, the identification of specific economic actors capable of crystallising and exercising intent. In order to establish authors of criminal intent, it is necessary to specify the corporation in terms of a subject or subjects. Whilst it is quite true that these subjects need not be human they must, nevertheless, express the requisite subjective attributes. Accordingly, this reliance upon a subjective caricature of the corporation cannot help but miss the central structure of corporate relations of ownership. It must be stressed, however, that so called 'structural' features have not escaped attention entirely. For example, Kaysen makes it quite clear that the basic issue is



one of 'structure'. It is the structure of the market which inspires, and even requires, parallel action or agreements to agree. But the preoccupation with the definition of parallel action fails to consider the structure which seems to enforce parallel action namely, the domination of the market by and for the few.<sup>(36)</sup> This sort of interpretation may have much to commend it, but the solution advocated by Kaysen appears to imply an unnecessarily restrictive definition of structure. Thus, divestment, divorcement and divestiture are seen as an effective relief against the problem of monopoly. Whilst it is quite true, as far as it goes, that 'behaviour' is a function of market structure, there is no guarantee that this structure will be altered by redistributing the boundaries of the corporate enterprise. Nor is 'oligopoly' or market structure a problem of legal ownership, to be remedied by redrawing the profile of stock ownership. To be sure, the call for 'structural' remedies necessarily implies that oligopoly, or the corporation as such, is not in fact prohibited. This much is perhaps obvious, and the point is often made that monopoly is not actually illegal. Nevertheless, there is a clear presumption, within anti-trust legislation and, especially within the anti-monopoly movement, that the law is used to regulate the increasing dominance of the corporate form through an attack on what it sees as its unacceptable consequences. Therefore, the spectre of monopoly and the promise of competition informs every moment of anti-trust legislation, even though monopoly as such is not quite illegal.

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(36) Kaysen, C. (1951) 'Collusion under the Sherman Act', Quarterly Journal of Economics, No. 65, (1951) Cambridge, Mass: Harvard University Press.

A section two charge requires more than just a demonstrable intention, it requires evidence of the necessary power to fix prices. Obviously, the definition of market power in question depends upon how the relevant market is construed. The assertion that, 'size is of course an earmark of monopoly power', was set forth in *United States v. Griffith et al.*<sup>(37)</sup> Thus, under certain circumstances, the offence of monopolisation may be inferred from the mere existence of a near or total monopoly on the grounds laid out in *United States v. Aluminium Company of America*, that 'no monopolist monopolises unconscious of what he is doing.'<sup>(38)</sup> Perhaps more importantly, the Griffith case established, further, that 'monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under section two even though it remains unexercised'.<sup>(39)</sup> There is, therefore, a clear presumption that size is an important criterion of monopoly power and, at times, even a direct determinant of the offence of monopolisation. Although size is seldom regarded as being actionable per se,<sup>(40)</sup> it is, nonetheless, an implicit determinant of action under the anti-trust laws. Furthermore, size is an important factor in determining whether or not a monopoly exists. For example, Justice Hand in the *Alcoa* case delineated the following rough and ready tariff: 90% of supply is sufficient to constitute a monopoly; 60 - 64% of supply is doubtful and 33% of supply is clearly not enough.<sup>(41)</sup> Of course,

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(37) 334 U.S. 100 (1948) 107 n.10.

(38) 2 Cir., 148 F 2d. 416, 432.

(39) 334 U.S. 100 (1948) 107.

(40) See *United States v. United States Steel Corporation* 251 US. 417 which states that mere size is not outlawed by section 2.

(41) *United States v. Aluminium Company of America*, 148 F 2d. 416.

by itself the issue of size is seldom conclusive and U.S. v. Columbia Steel, demonstrated that the "... relative effect of percentage command of a market varies with the setting in which that factor is placed".<sup>(42)</sup>

'Economic' criteria are undoubtedly important for any determination of monopolisation. For example, how the market is defined; its overall size, the strength of competitors, prevailing business trends, the freedom of entry, specific capital requirements for the participation in the market, geographical area, the levels of advertising and consumer demands, each of these has an important bearing on the definition of the 'power' to monopolise. Furthermore, evidence relating to the way that prices are formed and decisions made, their course, flexibility, relation to prices in general, price competition and customary procedures, is an important criterion of 'purpose'. The typically flexible requirements, necessary for a demonstration of a positive purpose to monopolise trade, stem from the considerable latitude involved in defining any particular restraint of trade and from the broadly based discretion as to whether such a restraint of trade is against the public interest. As Neale puts it, "Intent is assessed in the light of power".<sup>(43)</sup>

It is true that the requisite 'intent' is not normally the specific intent to monopolise, although such an intent does exist under anti-trust legislation, but rather a conclusion based on how monopoly 'power' was acquired, maintained and used. Accordingly,

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(42) 334 U.S. 49r, 527 - 8 (1948).

(43) Neale, A. (1966) op cit. p. 129.



the entire history and business policy of a corporation may be scrutinised and made relevant for the proof of a general deliberation and intention to monopolise in violation of section two. The charge of monopolisation may be sustained if a subjective intent to acquire and keep a monopoly position characterises business policy or, if an objective intent can be inferred from the continued existence of a monopoly. Objective intent is formed by analogy with the legal notion that human action, and thus corporate action, is intentional in the absence of evidence to the contrary. For example, the famous dictum enunciated by Judge Hand that no monopolist monopolises unconscious of what he is doing demonstrates one sort of objective intent.<sup>(44)</sup> Although 'reading off' intent from market consequences does not necessarily salvage the concept of intent as an effective means of regulation. On the contrary, the tendency is more toward re-inforcing the concept of intent and further compounding it by reference to an equilibrium between neo-classical (economic) subjects as an implicit measure of monopoly or restraint of trade.<sup>(45)</sup>

As we have seen, the definition of monopoly power in a specific market situation and the construction of a deliberate attempt to secure such market 'power' intermesh to provide typically flexible interpretations of 'monopolisation'. For example, monopoly need not violate section two of the Sherman Act, wherever market demand is so low that reasons of efficiency deem monopoly to be the most practical means of meeting it. Likewise, where a dramatic change in demand or cost leaves but a single supplier or, where a sole

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(44) United States v. Aluminium Co. of America, 148. F.2d 416 (1945).

(45) Aglietta M. (1979), 'A Theory of Capitalist Regulation', London: N.L.B. p. 13.



company survives by dint of superior skill, foresight and industry or by pre-empting demand by developing an entirely new product, then these situations may justify the existence of a monopoly. Therefore, if monopoly is 'thrust' upon a corporation by market forces or by any one of the above factors, providing that this is the only reason for the existence of a monopoly, then the corporation is not in contravention of section two of the Sherman Act. This position has been upheld in a number of cases which affirm the right of a corporation to have a monopoly but, nevertheless, introduce sanctions because of the way in which that monopoly has been exercised. For example, United States v. Terminal Railroad Association of St. Louis (1912); Gamco v. Providence Fruit & Produce Building (1952) and United States v. Lorain Journal Company (1951), all suggest that it is only the misuse of monopoly power which is likely to infringe section two. Even then, the issue of misuse may be decided by the definition of the relevant market, as in the Times Picayune Company v. United States (1953). Here, the Supreme Court returned a majority verdict in favour of Times Picayune on the grounds that, whilst the newspaper held a monopoly of the morning market, it did not have a monopoly of the combined morning and evening market and that its attempt to contract advertisers to a package deal was not tantamount to an offence of monopolisation. Nevertheless, this last case is not typical of the majority of cases of this nature.

There exists, then, a clear presumption that monopoly per se is not in fact illegal and that the offence of monopolisation requires some form of proof regarding business malpractice which is essentially unfair in itself. It is not the 'progressive' aspects of monopoly, for example, development, expansion, efficiency, which invoke the wrath of legal sanction, but rather the frustration and calculated exclusion of potential new entrants which is necessary

to precipitate action in line with section two. This general theme persists with reference to the specific section two charges of attempting to monopolise trade and combining or conspiring to monopolise trade. Neither of these special offences requires any evidence of monopoly power at all. In the former, proof of the requisite intent can be found in documents pertaining to the attempt, or in an assessment of the industrial backcloth to the attempt. Whereas for the latter, proof of intent can be regarded largely as a proof of conspiracy. The specific intention to monopolise is not consummated in the simple act of merger, but requires conclusive proof of a larger, altogether more sinister, plan to dominate the entire industry. Even where the attempt failed, the offence can still be proved, that is to say, monopoly power is irrelevant. For example, this has been upheld in the Columbia Steel case of 1948 and in the Yellow Cab case of 1949.

One thing is abundantly clear from the foregoing remarks. The Sherman Act appears to fall rather uneasily between two sorts of general criteria. First of all, 'economic' criteria are made relevant at various stages and, in particular, with regard to the more uncertain interpretation normally associated with the rule of reason. The exercise is designed to assess the consequences of specific market conditions. These consequences do not, necessarily, adhere to identifiable acts nor, for that matter, do they attach to particular actors. But rather, under certain circumstances, specific acts such as conspiracy or monopolisation can be linked with individual authors, largely through the notion of intent, and both may be inferred from market structure. Thus, economic criteria are inserted into legal concepts and become an essential part of the determination of an infraction. Secondly, legal criteria are involved in ascertaining intentional acts (conspiracy, monopolisation)

or specific practices (price fixing) which may limit competition. These acts or practices are outlawed in themselves and, whilst there may be some scope for discretionary definition of these acts or practices, once found they are outlawed per se. In practice, of course, these two sorts of criteria become intertwined. The essentially legalistic language of anti-trust statutes - which refer to intent and conspiracy as fundamental to the finding of a violation - together with the basically 'economic' analysis of market structure - which finds the concept of monopolisation utterly incomprehensible - often overlap. As might be expected, they do not prove to be happy bedmates. For example, there is a persistent tension between the two with regard to judicial interpretation and it is a tension which has only partially been resolved in favour of legal criteria. Thus, the Attorney General's National Committee stated that, "... The anti-trust laws establish criminal guilt or civil responsibility; here as in all other phases of the law, legal responsibility is individual".<sup>(46)</sup> Hence, actual behaviour cannot be deduced from general market structure, since legal responsibility has to be induced from direct evidence pertaining to the individual involvement and perpetration of a legally prohibited act, price fixing, monopolisation and so on. Although this interpretation is by no means clear cut. For example, the former Assistant Attorney General Wendell Berge said in 1940: "The rights of the accused which are of the utmost importance when liberty of an individual is in jeopardy, are irrelevant symbols when the real issue in the arrangement under which corporations in industry must compete".<sup>(47)</sup>

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(46) AGNCAT (1955) op cit. p. 340.

(47) ibid. Quoted, p. 353.



In other words, the corporations were treated unfairly according to a systematic violation of fundamental principles of justice. It would appear, then, that the suspension of legal rights, and the greater reliance upon bureaucratic intervention, did indeed have some effect, particularly in view of the somewhat strained reaction of the former Assistant Attorney General. It would be wrong, however, to conclude that bureaucratic intervention fared any better than a more legalistic form of economic regulation. They each have substantial failings. Whereas law is limited by its reliance upon concepts like conspiracy, intent and private property, bureaucratic intervention is perhaps preoccupied by an analysis of market structure in terms of ideal types (perfect or workable competition, monopoly and oligopoly) which cannot help but denegate material structures of ownership in favour of an hypothesised equilibrium between economic actors. In this sense, any restraint of trade is measured against a purely imaginary equation. As Pepinsky argues, the injury caused by price fixing is impossible to arrive at from the point of view of economic theory or economic practice. He argues that, "From the point of view of economic theory, the injury caused by price fixing is shown by models contrasting oligopolistic or monopolistic markets to competitive ones. The problem with this comparison is that a competitive market, as an abstraction, cannot exist in reality".<sup>(48)</sup> Also, the definition of economic injury from an empirical point of view is impossible because the simultaneous existence in the same economy of two markets for the same product with similar buyers and sellers

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(48) Pepinsky, H. (1976) op cit. p. 30.



is impossible. Thus, there is no basis for a comparison.

Accordingly, the ad hoc basis of bureaucratic regulation would appear to lack any clear cut criteria for arriving at restraint of trade and, therefore, would seem to be without a sound basis for a sustained regulation of economic conduct. Of course both legal and bureaucratic forms of regulation are each hampered, further, by the measure of their respective separation as agencies of regulation, but we are more concerned here with the content of regulation rather than the principle of regulation as such.

The Sherman Act represents the major thrust of anti-monopoly law, especially in view of the resolution of every statutory doubt in favour of the Sherman Acts basic anti-trust directives. Nevertheless, anti-monopoly law is far from exhausted by a consideration of the Sherman Act alone. For example, section seven of the Clayton Act, as amended in 1950, is the primary provision to which the department of Justice and the Federal Trade Commission resort on the question of mergers. The clear intention of section seven of the Clayton Act, which the 1950 amendment strengthened, was to halt undue concentrations of economic power and monopoly in their infancy; to nip mergers in the bud before an action under the Sherman Act became appropriate. As Walter Adams makes abundantly clear, "The Clayton Act is a prohibitory, not a regulatory statute. By its enactment, Congress did not intend to authorise the courts or the commission to determine whether particular mergers are good or bad or in the public interest. Instead, Congress acted on the presumption that a substantial foreclosure or elimination of competition was in itself a derogation of the public interest".<sup>(49)</sup>

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(49) Walter Adams in AGNCAT, (1955) op cit. p. 127/128.

As we have seen already, this is clearly a 'per se' approach to the infringement of free competition; an approach which denies not only the relevance of intent, the ethical basis of an acquiring firms business practice, but also, price fixing and the exclusion or destruction of competitors as well. Instead, it is quite sufficient to demonstrate the reasonable probability that a substantial lessening of competition or clear tendency toward monopoly would accompany a merger in order to secure its prohibition under the provisions of the Act. However, as the Federal Trade Commission made clear in 1953, "... competition cannot be directly measured; no single set of standards can be applied to the whole range of American industries. No single characteristic of an acquisition (would in all cases) ... of itself be sufficient to determine its effect on competition".<sup>(50)</sup> Instead, a case by case examination of all the relevant factors is necessary to ascertain the probable economic consequences. Whilst not directly equivalent to a Sherman Act test, since the Clayton Act requires a less stringent burden of proof, it nonetheless describes a substantial area of discretion and a tendency to submit to a rule of reason interpretation. This incipient rule of reason finds ultimate acceptance in the idea that in certain circumstances a merger can lead to increased and more effective competition and, consequently, the proliferation of oligopoly can be beneficial to vigorous competition between 'equals'. Coupled with the degree of indeterminacy associated with the questions of how substantial must any foreclosure of competition be and, at precisely what stage a merger constitutes an incipient derogation of competition, then the conclusion amounts to a considerable case for the rule of reason

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(50) F.T.C. Dkt. 6000 p.9, (1953) Quoted in AGNCAT (1955) op cit. p.121

approach. Furthermore, as Neale points out, the purely quantitative test of the substantiality of any decrease in competition is apparently insensitive to motive. Nevertheless, the preference of the courts for the concept of 'intent' tends to ensure the convergence of the Sherman and Clayton Acts on this particular issue, with the result that intent is still the earmark of an offence for the courts, if not for the Federal Trade Commission.<sup>(51)</sup> For example, the foreclosure of competition through vertical integration has not been successfully prosecuted in the absence of intent to monopolise. Moreover, the impact of the Clayton Act seems to be limited to the imposition of a sliding scale whereby gratuitous size requires less stringent proof of intent, coercion and interference and, vice versa, small is innocent.<sup>(52)</sup> Therefore, size appears yet again as an implicit determinant of action under anti-trust legislation, at once affirming the prevailing distrust of bigness and, also, forestalling the appropriate grasp of corporate relations. It is almost as if a theory of the corporate 'bully' stands instead of an accurate portrayal of corporate ownership.

It would be entirely incorrect to make the assumption that these general propositions are in any way definitive statements concerning the complex nature of anti-trust law. This is particularly true of the more contemporary use of anti-trust legislation as a rather different form of regulatory agency, tied much more explicitly to a type of cost benefit analysis based on levels of price formation. A consideration of these developments would be out of place here, particularly in view of the fact that they appear to change the

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(51) Neale, A. (1966) op cit. p. 473.

(52) ibid, p. 440.



complexion of anti-trust legislation quite dramatically, in a direction at odds with its original structure. What was once a perhaps uniquely American attempt to get to grips with 'bigness' and defend free enterprise, has passed over into but another 'tool' for the ostensible regulation of prices. Although, even with regard to the earlier course of anti-trust legislation, with which we are primarily concerned, the process of interpretation is complex and it would be as true to say that an equal case could be, and indeed has been, made out for an alternative interpretation of anti-trust legislation. The important point, however, is that at bottom anti-trust legislation, and the ensuing process of interpretation thereof, is bounded by two quite fundamental persuasions. First of all, 'economic' consequences are viewed as 'irrelevant' to the successful prosecution of a conspiracy in restraint of trade, monopolisation of trade or mergers. Secondly, there is a persistent tendency to attribute a great deal of importance to 'economic' context, performance, business practice and history. So much so that at times economic context may even be a crucial determinant of any action under the anti-trust laws.<sup>(53)</sup>

These two alternative perspectives on anti-trust legislation provide for a substantial contest sufficient in itself to account for the wholesale proliferation of anti-trust enterprise. Irrespective of which persuasion prevails (with a few exceptions the evidence is largely equivocal on this point), it can be stated quite plainly that each is entirely inadequate as an agency of prohibition and potentially flawed as an instrument of regulation

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(53) As Miller puts it: "... there is on the one hand a legislative-administrative process which provides a degree of flexibility in detailed application of the law in the face of different situations and changing attitudes, and on the other hand a judicial process which provides for substantial consistency and continuity in broad principles". Miller, J.P. (1962) 'Anti-trust Policy: the U.S. experience' in Miller (ed.) *Competition, Cartels, and Their Regulation*, Amsterdam:



vis a vis economic affairs in general and corporate structure in particular. In combination their respective weakness' tend to be compounded and, in isolation, their marginality in respect of corporate relations vitiates any potentiality which they may have to a degree which perhaps overshadows their particular failings.

#### Punishment.

So far the issue of enforcement of anti-trust legislation and the punishment of offenders have taken second place to the examination of the structure of anti-trust legislation. This is understandable given that the structure of anti-trust legislation is prior to its enforcement. There are, however, a number of important details concerning the actual enforcement of anti-trust legislation which amplifies, further, the argument concerning how anti-trust legislation is structured and how it portrays the corporation. The bare outline of enforcement is easily described. There are three principle enforcement 'mechanisms'. First of all, the Department of Justice, secondly, the Federal Trade Commission and, finally, the pursuit of private action by treble-damage litigants. Obviously, the process of investigation is complex, involving the sort of decision making criterion which inhere in any Criminal Justice system. Anti-trust legislation is no exception on this issue. The process is, however, subject to quite specific problems. For example, a comprehensive process of investigation is necessary in order to determine the existence of a probable violation; an investigation uncovers a violation rather than being stimulated by a criminal act into the process of finding a responsible author. Since resources are scarce there is a necessary process of selection and concentration at work and hence a wide ambit for the exercise of

discretion. Over and above this fully comprehensive investigatory procedure employed prior to the instigation of formal criminal or civil proceedings, there is the additional selection of the appropriate penalties (criminal action), equitable relief (civil action) or voluntary agreement (diversion process). In short the proper channeling of legal/administrative action occupies a crucial place in the determination of action under the anti-trust laws. Although formally impressive, the strategies for obtaining information are in practice attenuated, particularly with regard to civil cases. This is especially important given the relevance placed on information to the investigatory and dispersal procedure and the priority accorded the collation of facts in the judicial process in general. Indeed, the emphasis on facts is often held to be a direct consequence of the apparent generality of the statute law which comprises the anti-trust field. On this particular issue the Attorney General's National Committee was moved to recommend that, precisely because the complexities of business life govern the unpredictable nature of executive action, the criminal process should only be used where the law is clear and the facts reveal a flagrant offence and a plain intent to restrain trade unreasonably. One might add, also, that the existence of an effective relief, other than the empty reiteration of anti-trust's statutory provisions, is in part a determinant of action under the anti-trust laws. As Miller says of the 1946 American Tobacco Case "The government after winning the case was hard pressed to find any effective remedy since, in view of the structure of the market, instructing the firms not to conspire is of little significance."<sup>(54)</sup>

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(54) See Miller, J. (1962) op cit. p. 231.

The establishment of precedents of this nature plays a large part in determining whether or not any action will be taken in future and, if action is to ensue, what sort it will be. In addition to the issues of investigation, dispersal and enforcement, the department of Justice also claims some competence in relation to the provision of advance clearances and releases for proposed mergers.

Section eleven of the 1914 Clayton Act empowered the Federal Trade Commission with the authority to enforce compliance with the Clayton Act provisions. Thus, the F.T.C was endowed as an auxiliary organ of anti-trust enforcement. As such the F.T.C has no criminal jurisdiction but is instead a quasi-judicial administrative tribunal able, in theory, to hold hearings into suspected violations, to issue cease and desist orders and, contingent upon subsequent infringement of such orders, to refer a case to an appellate court for enforcement. The cease and desist order is basically an injunction comparable to a civil remedy in a Sherman Act case. The F.T.C also has power to investigate the operation of a department of Justice decree and, on presidential or congressional authority, to investigate violations of anti-trust statutes. In addition, there is an apparatus of informal settlements, trade practice conferences and voluntary compliance in general. The F.T.C has statutory powers to obtain information necessary to its function which are set out at section six of the F.T.C Act.

Finally, the incidence and success rate of private suits for damage, held to be a result of anti-trust violations, has increased dramatically since the end of the second world war. One problem with such suits is caused by the plea of nolo contendere to a criminal charge. The advantage of such a plea is that, whilst it doesn't dispute the charge, it, nevertheless, forestalls the



establishment of specific violations, which can form valuable precedents for any number of private treble damage suits. Likewise, it avoids the publication of what the corporation was up to, in terms of establishing specific factual transgressions. The advantages of suppressing publicity of corporate malpractice are fairly obvious and need not detain us here.

So much for the formal structure of enforcement. The actual patterns of punishment and discipline, however, which these diverse practices example, are more important determinants of the efficacy of legal and administrative regulation. Without doubt the most far reaching remedy available under the anti-trust laws is the civil motion in equity to decree the dissolution of a monopoly. Although potentially powerful, the measure is vitiated, in practice, by the general reluctance of courts to take what they regard as extreme action to restructure an industry. As Neale makes abundantly clear, "Neither in the Alcoa case nor in that of the United Shoe Machinery Company would the courts accept, as a practical matter, the physical dissolution of the organisation concerned".<sup>(55)</sup>

This reluctance is compounded by the practical problems involved in ordering the dissolution of monopolies and, as Neale goes on to point out, "In some cases the practical difficulties of dissolution seem to have frustrated the search for effective remedies altogether".<sup>(56)</sup> The supreme reluctance of courts to take this form of drastic action, except where the absolute necessity of such a decree is overwhelmingly compelling and its execution practicable and

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(55) Neale, A. (1966) op cit. p. 406.

(56) ibid, p. 406.



fair, is sustained by empirical evidence. For example, in over sixty years of the Sherman Act only twenty four litigated cases decreed divestiture or dissolution.<sup>(57)</sup> Apart from this empirical manifestation, the supreme reluctance betokens a dilemma close to the heart of anti-trust law; a dilemma which Justice Hand joined in enunciating in the Alcoa case of 1945 that, "... the Sherman Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor must not be turned upon when he wins."<sup>(58)</sup> Thus, as we have seen already, whilst the efficiency and dynamism of large enterprises may be viewed with pride and applauded accordingly, the power of unchecked monopoly is viewed with suspicion and cynicism. Ambivalence of this magnitude is adequately summarised thus, "To have the 'power condemned in the courts as illegal, and its exercise beset by complex injunctions, while the organisation itself remains intact, is a solution which reflects this ambivalence of attitude pretty closely".<sup>(59)</sup> Such ambivalence reflects the basic irrelevance of criminal sanctions, especially with regard to their essentially retrospective character and the fact that even quite substantial financial penalties wither in embarrassment beside the corporate budget. This fundamental irrelevance contrasts markedly with the apparently all too relevant civil remedy, in that decrees granting divestiture or dissolution are almost too radical to even contemplate as a 'solution'. The answer, to this evident discrepancy between criminal and civil

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(57) See AGNCAT (1955) op cit. p. 354.

(58) 148F. 2d 416 (12).

(59) Neale, A. (1966) op cit. p. 436.

sanction, seems to be to embrace some form of behaviour or conduct modification whereby the courts decree detailed injunctions relating to specific practices, a kind of prospectus of rights and duties designed to regulate business conduct without changing the structure of ownership which may inspire such conduct in the first place. In this respect Neale makes the following remark, "In a sense the real purpose of all that goes before the Court's decree - the complaint and trial - is to obtain jurisdiction over the parties for the purpose of regulating their business conduct".<sup>(60)</sup> As far as 'real' structural remedy goes, an interesting variant of the 'prospectus' approach has recently been recycled by Ralf Nader, to the effect that corporate charters should include specific restraints on corporate conduct.<sup>(61)</sup> Although, such solutions have long been decried by the advocates of so called 'structural' remedy (Kaysen, Turner) who seem to imply that one cannot 'instruct' a corporation to throw off the market pressures which produce monopoly situations. Finally, even in the rare cases where the formal structure of legal ownership is altered by dissolution, the actual structure of ownership may alter very little and the relationships between the component parts of the former corporate empire remain substantially similar. This much is admitted in law by the inherent suspicion that even independent firms may in fact conspire to produce what amounts to a monopoly situation. It is further sustained in practice by the assessment of the famous dissolution of Standard Oil in 1911. Despite being fragmented,

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(60) Neale, A. (1966) op cit. p. 396.

(61) For a criticism of this approach see Stone, C. (1975) op cit. although it is difficult to see how Stone's 'socially aware' corporation would fare any better than one 'sewn up' by a restrictive and prescriptive charter. See Nader, R. et al (eds.) (1976) 'Taming the Giant Corporation' New York, for the original position.

the various 'independent' 'standard oils' continued to respect each others marketing zones and acted in concert to suppress the independents, at least until such time as new international conditions provided even greater scope for monopoly and thus new arrangements with 'competitors'.

The options open to law are considerably restricted. Even supposing that the courts manage to overcome their supreme reluctance to penalise enterprise, the efficacy of what appears to be an extreme remedy, dissolution, is vitiated in the extreme. If, on the other hand, the interrelationships between 'independent' corporations are taken into account in assessing 'restraint of trade', then the arsenal which is made available is substantially hampered by the concepts of conspiracy, intent and private property. Either way, the room for manoeuvre is blocked with the result that truly effective legal regulation would appear to have been a dead letter.

Anti-trust legislation sets out two main sorts of sanction namely, criminal and civil. Whilst both sorts of sanction point to the centrality of legal process they, nonetheless, each index quite different types of discipline. Whereas 'criminal' sanction points up the centrality of punishment and of retrospective penalties for specific transgression of statute law, 'civil' sanction forces the issue of the appropriate remedy of restructuration, intervention, injunction or private damages to the forefront. What they share in common is some implicit conception of corporate relations. Criminal sanction relies upon the feasibility of comprehending corporate structure through the concepts of conspiracy, intent and private property; concepts which reinforce the picture of the corporation in terms of human subjects and individual authors. Therefore, the application of monetary sanctions is designed to affect the behaviour of the corporation in the same way that individuals are held to be



deterred from re-offending. Accordingly, the corporation is seen as a rational 'economic' actor, capable of calculating the simple equation between profit and cost, pleasure and pain. As Stone points out, "The underlying reasoning is pretty much the same 'bad bargain' analysis that we have brought forward from theorists like Bentham, and have simply transferred from people to corporations without reflection".<sup>(62)</sup> Not only are such classical conceptions of criminality suspect in themselves but, further, there is very little warrant for supposing that the corporation would act in the same way as an individual in any case. The 'behaviour' of corporations is in no way reducible to individuals, so why should it behave as if it were? Why should anti-trust legislation assume that the corporation is a unified essential subject which can both experience 'sanctions' in the same way as individuals and, act upon that negative experience, to modify its conduct in the way that individuals are supposed to? The answers to these questions are exceedingly pertinent, for they penetrate to the heart of the entire notion of legal regulation and expose glaring faults.

Conversely, civil remedy assumes that to beset the corporation with a host of complex injunctions, each referring to specific practices from which the corporation must desist, means that the relations which sustain and inspire such practices will modify accordingly, if not immediately then in due course. If they do not, and given that dissolution is practicable, then the courts have recourse to the ultimate sanction. The courts are able to decree some form of dissolution and thereby redraw the corporate boundary. But, as we have seen, this may leave intact the interrelationships

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(62) Stone, C. (1975) op cit. p. 36.



between operating units together with the more or less ubiquitous forms of calculation which may ensure parallel response.

Civil remedy is caught between dissolution and regulation which reflects the very marginality of law, able to intervene only at the margins of formal ownership and openly exhibited conduct. Criminal sanction is construed in terms of individual authors and identifiable practices. This is confirmed in the parallel reluctance to use the imprisonment clause provided in the Sherman Act. For example, 'The very few cases in which jail sentences have been imposed have mostly featured some special element of racketeering or fraud which aroused moral indignation'.<sup>(63)</sup> Therefore, the law is more concerned with attaching penalties to individual or corporate authors than with effective regulation. To be sure, these monetary sanctions may be more burdensome to the individual than to the corporate subject, but they are not necessarily any the more effective for regulating the structure of corporate interrelationships.

Particularly in view of the fact that corporations can find ways of indemnifying its officers from all but the hard end of criminal sanction and, even there, can find alternative ways of 're-imbursing' its officers. Even if these 'penalties' were substantial, there is no guarantee that they would result in any changed 'practices'. Finally, it is often argued that the real value of anti-trust legislation lies not in what it does but in what it does not. That is to say, in its capacity as a general deterrent. It is argued that the abhorrence associated with the stigma of criminal prosecution is such that it deters all but the hard core of corporate criminals. As Wendell Berge argued,

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(63) Neale, A. (1966) op cit. p. 394.

"The stigma of indictment tends to be the real punishment".<sup>(64)</sup>

This is a little disingenuous given the relative attenuation of criminal sanction and the marginality of the human subjects apparently capable of espousing such feelings. Moreover, even if the responsibility for corporate crime can be traced to readily identifiable personnel within the corporation, this does not imply that they or, more importantly for the 'stigma' argument, their contemporaries, will actually perceive the 'offence' as 'real' crime to be viewed with genuine abhorrence. There is much evidence to suggest that such an expectation is, at best, equivocal and, at worst, wholly misleading.

#### Conclusion.

The purposes of this Chapter have been twofold. First of all, to demonstrate that legal regulation and administrative agency are both interventions of one 'form' with respect to another, economic, 'form'. This much is upheld in the constitutional separation of powers enshrined in Anglo-American political domains. Law and Economy are fundamentally distinct but, nonetheless, firmly interrelated - contract, exchange and proprietorial right, facilitate and enable economic production. Therefore, the separation set out as a cornerstone of bourgeois democracy is undermined from the inside. But, more importantly, this initial separation accounts for the attenuation of the legal/administrative review of corporate relations. Thus, law is excluded from a realistic intervention

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(64) Former Assistant Attorney General, Wendell Berge quoted in AGNCAT (1955) op cit. p. 353.

in corporate forms of ownership because of the marginality imposed upon it by the doctrine of separation. Accordingly, law is restricted to the limited role of intervening in corporate affairs and, consequently, reduced to policing what can only be described as the margins of corporate crime. Secondly, the structure of 'legal' ownership, and its reiteration in the respective concepts of company law and anti-trust legislation, ensures that 'corporate' forms of ownership escape the grasp of legal sanction. To be sure, the escape is not unequivocal, but it is an escape which leaves imprisoned the general relationships of ownership which characterise the corporate 'economy', whilst redrawing the form of corporate boundaries, sacrificing certain corporate personnel and perhaps denting the corporate persona a little. This corporate genuflection before the altar of legal regulation is far from just a mere gesture. On the contrary, it is a real concession to criminal sanction and civil remedy: the 'law' does have real effects. Although, in the final analysis, insofar as anti-trust legislation is concerned with the form of ownership, and given that this remains substantially untouched by anti-trust action, then anti-trust can only be adjudged a relative 'failure'. Precisely what it is that anti-trust law has failed will be discussed in the following Chapter.

CHAPTER VI

THE ANTI-MONOPOLY MOVEMENT.



Anti-trust legislation is commonly regarded with a certain amount of dissatisfaction. Dissatisfaction with its utter failure to do anything significant about the trusts; disgust because agencies of regulation have become regulated agencies (chief among the regulators being the very corporations that anti-trust was designed to shift) and, distaste because agencies of regulation have somehow spawned yet more agencies in a veritable orgy of state control. This last sense bears witness to the contemporary obsession with 'de-regulation', both in the U.S.A and, more recently, in Great Britain. This dissatisfaction with anti-trust legislation clearly references discrete sources of grievance, but they share in common the tendency to discount the historical role played by the anti-monopoly movement. It is almost as if the movement is ignored in what has become the celebration of an American failure; the counterpoint to the success story of business and enterprise. Or, worse still, the movement is regarded as but a pawn in a ploy by cynical plutocrats designed to fettle the opposition.

This Chapter aims to restore a certain authenticity to the anti-monopoly movement and to describe the arterial network which formed the basis for its construction. Thus, it is argued, the anti-monopoly movement can best be analysed as a genuinely independent movement irrespective of the particular 'fate' of anti-trust legislation. On the contrary, this fate has its own origins which do not concern the motives or the structure of the anti-monopoly movement as such but, as it has been argued, refer to the nature of law per se.

In Chapter One there was an implicit indication that the anti-monopoly movement was both authentic and, in some respects, even potent. This belief can be sustained by the demonstration of distinct reasons for the failure of anti-trust legislation,

reasons which relate to the structure of law per se rather than, for example, to the omnipotence of big business. The construction of specific reasons for the relative 'failure' of anti-trust legislation to control monopoly relieves the anti-monopoly movement and, to some extent, anti-trust legislation of any necessary status as purely instrumental tools of big business or the capitalist class in general. Therefore, the argument evinces a clear rejection of any attempt to reduce anti-trust legislation to the abstract requirements of capitalism or, again, of those tendencies which seek to remove the arena of political tension and class conflict from the agenda. Although Eschewing these tendencies does mean that the issue of political struggle and strategy is forced to the surface. It is necessary, therefore, to demonstrate the appropriate framework which allows for the specificity of political strategy.

#### Political organisation.

There are a number of ways in which the specificity of political practice may be realised. Two principal means of realising this aim will be examined. In the first, largely associated with the work of Louis Althusser, the role of the political is normally granted a measure of autonomy, albeit within a context in which the ultimate impotence of the 'political' is induced by the coming of the last instance. For this perspective, the state somehow ensures the 'final' coherence of ruling class interests and, in this particular case, it manages to negate any residual hostility toward 'monopoly' capital. The second, involves a discussion of the recent work of Cutler et al.<sup>(1)</sup> Here, the radical independence

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(1) Cutler et al & Hirst, P. (1977) op cit. (1977 & 1978) op cit.  
See also Hindess, B. (1978).

of politics is ensured in a way which dissolves altogether the privileged relation of political representation to 'economic' interests. For example, there is no reason why political issues need represent more basic 'economic' interests. Indeed, it is argued further that the conditions which allow economic interests to be theorised 'separately' entail unacceptable consequences.<sup>(2)</sup>

The concept of Relative Autonomy enshrined in the work of Althusser depends upon the particular mechanism responsible for ensuring 'relativity'. As we have seen, this mechanism appears to collapse all too readily into the requirements of the last instance and the coherence of the 'totality'. On the other hand, 'absolute' autonomy would seem to liberate politics altogether, projecting interests into the realm of Social Democratic politics. Because politics is genuinely autonomous, everything is possible. It is almost as if the political manifesto carries the seeds of its own fruition. Both of these positions entail unacceptable consequences, not least because of the way they pose the problem in the first place. This particular conception is not restricted to these two perspectives. For example, the problem of political specificity is invariably seen in three basic ways. First of all, in terms of a series of instances which are integrated, subsequently, within a totality. Secondly, as a tripartite division of powers, which are somehow fixed in splendid isolation and independence. Finally, and in the interests of avoiding rampant idealism, as the

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(2) Of course, there are other ways of rendering specificity to the political. For example, the work of Max Weber represents just such a tendency. The two accounts discussed here, however, are of particular interest because they address the problem of the interrelation of the 'political' and 'economic' and, moreover, they do so in ways which are quite distinct. The issue of the interrelation of 'political' and 'economic' relations is a pertinent one for the reason that it is basic to the existence of an anti-monopoly movement.



political expression of formally separate economic interests.

Each of these perspectives involves the necessity of some mechanism which explains the eventual co-incidence of initially or relatively separate 'instances' of sociality. To the extent that this mechanism is specified, it sets unnecessary obstacles to the conduct of social inquiry and, to the degree that it is absent, sets new standards in myopia. In opposition, it is argued here that the concept of totality, the concept of the political representation of economically derived interests and the intriguing possibility of 'necessary' non-correspondence, each forestalls the 'proper' solution to the complex problem of political specificity.

The task of this introductory section is to establish the parameters which allow the anti-trust movement a substantial measure of authenticity, on the basis of the existence of specific reasons for the failure of the movement to achieve its objectives.<sup>(3)</sup> These reasons clearly involve the use of law as such. Thus, it is argued, to state the eventual convergence of federal institutions around the requirements of monopoly capital, or the 'needs' of capitalism in general, even if it were true, would explain nothing without recourse to some conception of an 'expressive' causality. This conception upholds the sort of coherence provided by the concept

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(3) It is quite true that anti-trust legislation does have its defenders. For example, Rashid, B.J. (1960) 'What is Right with Anti-trust', Anti-trust Bulletin, 5. There is, however, a substantial body of opinion which points to its complete failure, particularly during the period under discussion, See Reagan, M.D. (1963). 'The Managed Economy', New York; Arnold, T. (1937) op cit. and Pearce, F. (1976) op cit. Furthermore, it will be argued, in due course, that the anti-monopoly movement was directed at the corporate form of business organisation which, by its very longevity, signals a major setback to the realisation of the anti-monopoly movement's objectives. It is in this sense that the word 'failure' is used and the full sense of the word is not mitigated by the mere inscription of anti-trust legislation upon the Statute book.



of a 'totality' and, also, re-inforces the co-incidence involved in the reduction of political action to economic, and in this case essentially capitalist, interests. Of course, there have been many attempts to shake loose from the consequences of conceiving the anti-trust movement thus. But these attempts are, sooner or later, presented with a paradox. For example, to the extent that one or other of these 'explanations' is seemingly rejected, then the underlying account of the failure of anti-trust legislation becomes meaningless. On the other hand, if they are retained, then the consequences of such a retention involve an entirely unacceptable portrait of the social formation as a series of levels linked by some form of expressive causality. The problems involved in this sort of conception have been recorded elsewhere. Furthermore, to talk specifically in terms of 'capital' as having a goal or, 'capital' as being in some sense in control of the state, is to misunderstand the nature of capital. For example, monopoly capital is often held to control the state and, therefore, to limit the effectivity of anti-trust legislation. But it is constantly re-iterated, within political economy, that capital is not a thing but rather a relation. More importantly, perhaps, it is a specific type of social relation constituted through discrete forms of calculation, strategic controls and enabling conditions. At the very least, this realisation would appear to forestall the a priori distribution of social space into economic and political instances, production relations and social relations. In addition, it would seem to generate the possibility of avoiding the reduction of political positions to economically derived interests. Finally, it would appear to render highly ambiguous the concept of the control of the state apparatus by capital or, a fraction of capital, for example, 'monopoly' capital.

The argument is quite easily summarised. The concepts of relative autonomy, non-correspondence and economism, are each predicated upon a nominal or actual separation of instances and, therefore, lead on, quite naturally, to an obsession with the sort of relationship and priority which governs any subsequent communion. As we have seen, in Chapter two, such issues are inherently intractable.

Let us examine the problem in more detail. Once the problem of anti-trust legislation is conceived in terms which suggest 'structural' relations, on one side, and 'phenomenal' effects, on the other, then the twin problems of determinism and causality appear on the agenda. The essentially spinozian concept of structure implicit, albeit vehemently denied, in the work of Louis Althusser, (the structure is present in its effects) avoids the problem of specifying modes of causality, since everything is subsumed under a special type of structural causality. But this in no way absolves Althusser from a more fundamental criticism, namely, the tension induced by arguing the centrality of what amounts to a determinative principle, and the forms of historicism and essentialism implied therein, at the same time as he maintains a rigorous polemic against all forms of economism, historicism and idealism. Alternatively, Cutler et al would argue for the radical separation of determinate relations of production and their conditions of existence, which re-introduces the problem of determinism but for which they fail to specify any sort of solution. Where their position does entail some indication of the mechanism involved in connecting conditions of existence to determinate relations of production, it seems to hinge upon the fact that determinate relations of production 'possess' conditions of existence. These conditions of existence are uniquely 'theirs'.

As we have seen, in Chapter two, this involves an exceedingly formal type of functionalist explanation. Exactly how this solution, which remains implicit in their work, accords with the simultaneous denial of all forms of causality is not entirely clear. This is especially confusing since the denial of causality seems to depend upon the twin problems of causal agency and the cleavage of social space into instances.

On the other hand, if political actors are granted a measure of independence - they are not simply reduced to the immanence of the structure in its effects and are analysed in terms of their representation of the 'interests' of big business, farmers or entrepreneurs - then the problems inherent in the concept of 'interests' and, the issue of what it is that they 'represent', became crucial. For example, to state that a political position, platform party or argument is in the interests of big business is to specify those interests independently of the means of their representation, to locate an abstract arena where the interests of big business can be crystallised quite unambiguously. The actual course of politics can then be measured against this abstract spectrum. But, as Hirst makes clear, in the absence of any attempt to account for the 'distortion' or 'non-representation' of fundamental class interests the analysis is short circuited and, once again, politics becomes the more or less direct expression of basic class interests.<sup>(4)</sup> Both the concept of totality, and that of 'interests', appear to grant a measure of autonomy to the political but, as we have seen, inserting that 'autonomy' into a coherent social formation or, constantly referring it back to more

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(4) See Hirst, P. (1977) op cit.



basic and, therefore, more real class interests or potentialities, produces one of two results: either the concept is made redundant and once again politics reflects economic forces directly or, the distortion is entirely accidental and, therefore, beyond analysis. At the very least this is surely an inadequate basis on which to conduct an examination of what will be argued is the specificity of political action and the specificity of the anti-monopoly movement.

The problem is by no means exhausted by these two particular attempts to render a solution to the problem of political authenticity. Even if the concept of an expressive totality, and the notion of interests and their representation in politics, are rejected, the manner in which the problem is posed reduces, still further, the likelihood of a proper solution. For example, to state that monopoly capital has certain requirements and that these requirements are represented in particular forms of political action, even if such representation or reproduction is imperfect, qualified or independently determined, is to indicate an underlying motor of history, which allows monopoly capital to be the fundamental dynamic of historical change, and a functional correspondence between phenomenon and essence, politics and interests, which enables those requirements to be met. Both Hindess and Hirst, quite clearly reject the concept of 'interests' as representations of svengali like forces and they, therefore, refuse the necessity of any correspondence. But, for all that, the concept of determinate relations of production, their conditions of existence and the means and practices which achieve them cannot, at least on the face of it, avoid specifying a functional relation, between 'production' and its conditions of existence and, a contingent



connection, between political practice and 'conditions' of existence. Nevertheless, they both assert the radical autonomy of political practice and, hence, the possibility of addressing political movements and strategies in their specificity, rather than in their capacity as manifestations of a more basic essence. In asserting such autonomy, however, they allow for the possibility, even the necessity, of some form of their general interconnection. In this sense it seems quite inevitable that there is some prior allocation of social space involved. But the warrant for such a division appears to be arbitrarily decided and, as we have seen, presents problems which are perhaps unnecessary.

Each of these various renditions of the 'relative autonomy' of political practice depends upon an implicit concept of class. To be sure, the concept exhibits considerable internal variation, but the concept as such occupies a privileged position. For example, the concept of class may be used to secure a positive relation between political representation and economic interests. Or else the concept may be more of a vision, an ultimate reference point for and a proximate site of, a whole host of intersecting, relatively autonomous determinations. Witness the way in which the class struggle is often invoked to account for particular discrepancies. But, as Poulantzas & Althusser have made abundantly clear there are no social classes prior to their opposition in struggle, classes do not exist first and foremost and only then join in struggle. Classes can only be identified in the process of struggle and, more importantly, only come into existence in forms of struggle and conflict. Therefore, struggle would appear to assume a certain priority over classes and the associated problem of prior or structural determination. Hence the elegant, albeit excessively formal, typologies of class determination produced by

Erik Olin Wright, are essentially secondary problems.<sup>(5)</sup>

Accordingly, the actual forms of struggle, conflict, tensions, strategies, political articulations, issues and arguments, are of paramount importance and are not just secondary to some real arena of class struggle situated within structural parameters or on the terrain of history. In short, attention cannot centre on an essential theatre of class struggle demarcated by orthodox Marxism, of which particular issues are but phenomenal manifestations, without in turn heralding the relative denegation of particular political strategies. To assert the specificity of political struggles in such a context as this is an essentially stillborn enterprise which, at the very least, forestalls a proper analysis of the anti-monopoly movement.

In terms of the analysis of anti-trust law the foregoing argument has a number of highly specific consequences. For example, the anti-trust 'movement' can be viewed, on this basis, as a particular articulation of discrete forms of 'political' practice comprising distinct organisational forms and definite structurations of 'political' issues quite irreducible to the crystallisation of interests condensed in the wholly abstract domain of 'class struggle' or, to the requirements of specific fractions of capital or, to the functional necessities of determinate relations of production. Of course, a number of issues remain unresolved by this form of argument namely; what is the relation between the apparently 'real' adjustment of the form of ownership and the forms of political opposition/defence entailed in the anti-trust movement? If there is a genuine

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(5) Wright, E.O. (1978) 'Class, Crisis and the State', London: N.L.B.

independence of 'politics' from 'pure' class positions and interests, a genuine liberation of the political from the artificial insemination by the economic instance, then, a radical separation is entailed along the lines advocated by Cutler et al, with all the attendant difficulties thereof. But, if the specification of instances is dissolved on the basis that there is no distinction between political and economic instances, merely organisational complexes which defy classification as economic/political items, then the question of representation is made redundant. Everything is 'determined' by their essential organisation as social relations per se; the anti-monopoly movement is inseparable from laissez-faire Capitalism and Entrepreneurial forms of ownership, with the result that laissez-faire capital re-appears in person on the 'political' stage. Given the form of the critique employed here, this solution is clearly unacceptable, although it is by no means certain that it is the inevitable conclusion to the radical dissolution of instances. Let us consider the position espoused by Cutler et al: there are determinate relations of production, these have specific conditions of existence which are secured by distinct forms of political and social practice. The first point is why must determinate relations of production assume priority over their conditions of existence and their ensuing relation assume a functional form? No doubt the answer is that materialism necessarily implies some form of priority for relations of production, although as we have seen, such a conception of the relations of production is unnecessarily restrictive, which leads on to the second point. Why distribute social relations into determinate and conditional relations, especially in view of the radical denial of the validity of distributing social space which underlies the rejection of



instances and the criticism of general doctrines of causality? Surely the logical outcome would be a seamless web in which causal priority is denied, rather than a surrogate form of conditional and determinative 'instances'.<sup>(6)</sup>

The present argument is conducted in terms of taking further the concept of radical discontinuity whilst, at the same time, recognising the more fundamental and particular continuities which characterise all forms of sociality. Since it is impossible, for a genuinely social analysis, to separate instances, items and forms without at some stage re-introducing a general means for their subsequent interrelation, then, a truly radical separation of forms, or the assertion of political specificity, is only possible on the basis of a completely different form of continuity. Discontinuity presupposes continuity and it is, therefore, a question of what sort of continuity characterises social relations. Thus, to state the specific convergence between the social form of ownership, a particular strategy of political organisation, a series of constitutional premises and so on and, the construction of a political platform of anti-monopoly politics, is very different from countenancing a general relationship between class determination, real or potential interests, and their political expression; a long way from reading off political positions from class or economic locations. In short, there are a whole series of contingencies which comprise the anti-trust movement. There is a complex network of social relations, law, forms of calculation and technical criteria which govern the 'existence' of *laissez-faire* 'capitalism' and, therefore, the basis

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(6) Wright, E.O. (1979) 'The Value Controversy and Social Research', N.L.R. 116, p. 72.



of anti-monopolism; a whole series of socio-cultural residues which cannot be adequately comprehended by the distribution of sociality into determinate and conditional relations.

A number of objections may be made to this sort of argument not least because it appears to be a form of pluralism. Whilst there may be a plurality of 'contingencies', the one element crucial to a definition of pluralism namely, the demarcation of a given social item, the state, from the range of forces which influence it, is quite definitely absent. Accordingly, the tendency to drift into a general theory of multiple-causality or a concept of political plasticity is muted. At the very least the conception of the state as but a special type of organisation of social relations would prevent the state from being regarded as an instance with the capacity to condense separate and politically diverse interests. Likewise, the companion charge of historicism or essentialism would also be misplaced. In the absence of any fundamental, unifying or determinative principle earmarked by a spirit, epoch or totality which forces its imprint on all social relations it seems difficult to envisage how such a charge could be sustained.

It is perhaps inevitable that the argument has, so far, remained rather defensive. It is possible, however, to assert the analysis more forcefully. It was argued in Chapter IV that each of the relations of ownership contains a fundamental tension or conflict, it is this tension which characterises the dynamic of the relations of ownership and their capacity to change. Thus, 'title' is governed by a persistent tension between sale/income and between 'corporate' and 'stockholder' claims; 'possession' is gripped by a struggle over the conditions of the labour process, strategies

and counter-strategies are evolved as problems of organisation, research is undertaken, innovation countenanced and various human relations and organisation theories invoked, stimulated and commissioned as practical and theoretical responses to problems generated by the tension inherent in the relation of possession/exclusion; 'control' is engrossed by larger issues of national/international climate. All three relations are articulated together in a complex, wholly interactive manner and, as such, define the (corporate) form of ownership. The determination of particular classes is not the primary aim; that tension and conflict exist can be stated independently of specifying the class location of the 'supports' of such struggle. Thus, the general relation, ownership of/separation from, replicated in discrete ways in each relation of ownership, describes the source of a fundamental conflict without requiring the actual presence of wholly unambiguous classes at each and every point. The primary reference is to elements of struggle, rather than to completely formed historical agents each embodying some pure class position diametrically opposed to, and inextricably set upon a collision course with, another pure class location. The fundamental problem is not really resolved by a resort to contradictory class locations, which serves only to demonstrate the facility with which basic categories admix themselves in ever more infinite permutations.<sup>(7)</sup> The position argued here suggests that it is necessary to dissolve the trajectory of an essentialist form of class struggle in order to realise the particular character of 'regional' struggles, tensions and conflicts. Accordingly, 'interests' are defined, not as quasi-automatic

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(7) For example see Olin Wright, E. (1978) op cit.

reflections of neo-class positions but, in terms of organisational forms and strategies constituted in the very interstices of ownership. For example, this procedure bears directly upon the notion of whether there exists a distinct managerial elite unified by a series of interests which separate managers, as a distinct class, from the narrower range of 'capitalist' interests. As Hindess & Hirst respectively point out, it is not so much an issue of groups, positions and classes but rather, strategies, political sediments and legal residues. In short, it is unnecessary to identify 'interests' and, therefore, authors of such interests, since it is quite sufficient to locate political forces and arguments in as much as they are constructed through definite forms of political practice and organisational strategy.

It is not so much that 'ownership' is real, and that legal and ideological forms are predicated upon, or indeed lag behind, that prior reality but rather, that the relations of ownership are inextricably tied up with so called 'ideological' frames and decision making parameters, which in part constitute those relations. But this is no structural determination of class position or an economistic derivation of ideology, state and law since (i) the form of ownership is not a structure, nor is it yet a totality, still less is it a constellation of positions, and (ii) ideology, law and state are not conditions of ownership, nor are they reflections of ownership, they are quite simply mutually implicated in forms of ownership. The form of ownership is defined by the organisational strategies and relations which do not necessarily form a unity, and, therefore, cannot be reduced to an essential principle of ownership/separation, nor can they be fixed as a static, functional complex. But neither are they radically distinct in the sense of being assigned a priori to particular social destinations - the economic,



the political, the legal - such that their autonomy becomes problematic and ultimately reduces to some concept of overall or final convergence. This may be a hard option but, since relative autonomy is ultimately meaningless and radical autonomy virtually impossible, there is no alternative but to consider ways in which specific discontinuities are rendered in a general context of continuity. To be sure, the danger of conflation applies an important brake to this conception and, whilst it is quite true that such an argument provides no prior grounds for distinguishing levels, or types of social relations, the organisational relations are, nevertheless, discrete 'orders'. But they are not discrete in a way which draws rationalist cleavages between 'real' adjuncts of academic disciplines; law and economics, or which assign certain types of sociality to discrete levels of the social formation. In a word this argument is perhaps the logical outcome of a systematic denial of epistemology and hence of the relation between existence and discourse, (Hindess & Hirst) and the result of an attempt to take seriously the notion of structuration (Giddens) as an alternative to structure.<sup>(8)</sup>

#### Anti-monopolism.

It is now possible to confront the components of what may be termed anti-monopolism. Whilst falling considerably short of prescribing free competition and enjoining business to compete under the threat of injunction or criminal sanction, the federal anti-trust laws are, nonetheless, inextricably bound up with a particular set of social arrangements based on the theme of free

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(8) Giddens, A. (1979) 'Central Problems in Social Theory', London: Macmillan.



competition and laissez-faire capitalism. The 'connection' is forged in at least two particular ways: not only does the Sherman Act fail to make any sense outside of a context which records an implicit faith in some sort of free enterprise system, but the central protagonists on the 'political' stage and, the 'final' assessment of anti-trust law, can only be regarded in the interstices of two general 'types' of social arrangements. For example, to talk of monopoly points inevitably to a distinct type of ownership in which a substantial proportion of any local, national, or international market is brought under the auspices of a common organisational complex. Whether the components of a corporation are formally separate or organisationally uniform, the very fact that a company has a monopoly means that the form of control is distinct from that entailed under free competition and that the relations of ownership are different in consequence. These two general sets of social arrangements define the parameters for the anti-trust movement and anti-trust law respectively.

Although the fundamental provisions of anti-trust law have considerable common law precedents/antecedents dating back to 17th Century English law, these provisions only become all the more opaque when viewed as the systematic outcome of a process of rationalisation and legal change, or as the advance which signals the essential mutability of law in the wake of complex industrial and social change.<sup>(9)</sup> For this sort of perspective, law is counterposed to other forms of sociality as an item governed by an internal dynamic of advance, rupture or response to external exigencies, rather than being looked at as a complex element fully

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(9) For a detailed account of the genesis of anti-trust legislation see Thorelli, H. (1954) op cit.

'integral' to the organisation of social relationships. For the present, anti-trust law is not seen primarily as a rational administrative response to the erosion of enterprise by a wholly alien and apparently spontaneous outburst of monopolisation or merger mania, but is instead viewed as a strategy undertaken as a challenge to a particular sort of social organisation which involves, as a matter of course, a defence of certain sets of social relations. That the strategy was authentic and sincere is very far from implying that it was necessarily successful or that it echoed some basic revolutionary chord in the class struggle. Of course, this procedure necessarily points to some form of 'class struggle', but it is far from being the sort of original class struggle which maps out all social relations or which provides the motor of history; far from the struggle between classes which at once characterises the totality which in turn structures class position and thence, in true circularity, class struggle. On the contrary, it is viewed in terms of a highly specific strategy which involves the tensions and contradictions engendered by the form of 'ownership' and the form of organisation of social relations.

A cautionary note should be sounded in relation to the substance of this Chapter. An argument such as the one presented here depends upon the precise determination of what happened in the run up to the Sherman Act of 1890. Otherwise there is an equally powerful argument to the effect that anti-trust legislation was the result of an entirely cynical manipulation of concessions formulated and granted at the conscious level by political leaders or hypothesised as entirely responsive to the interests of the ruling class or big business. There is, however, a sense in which 'what happened' is beyond us. The empiricist denegation of the past as

non-existent, and history as thereby impossible, carries considerable weight, particularly in view of the historians reliance on empirical materials - accounts, reconstructed events and so on - materials which are publicly contestible but, nonetheless, 'empirical' artefacts. The analysis must hinge upon something other than the actuality of historical evidence. In the absence of absolute guarantees concerning the past, whether sustained by Rationalist or empiricist forms of discourse, attention must turn to other sorts of requirement. For example, Poppers assertion that elegance may, under certain circumstances, stand as a criterion of 'scientific' acceptability or, E.P. Thompson's insistence, on the unique quality of 'historical logic' would at least appear to allow for alternative 'guarantees' of scientificity.<sup>(10)</sup> What is clear is that history can in no sense provide an independent crucible wherein the competing claims of historical interpretation can be resolved. On the contrary, historical explanation of this kind touches the very core constituents of any social theory - what kind of social portrait does a particular 'historical' explanation imply, what are the implications for social analysis entailed therein? These are the sorts of issues which separate out competing interpretations of the anti-trust movement. Not a claim to absolute truth, nor even to relative acceptability or to purity of purpose, but to the consequences and coherence of social theory entailed in any analysis of anti-trust law, legal regulation and control.

The orthodox liberal historians view of anti-trust, gently satirised by Hofstadter and pedalled more or less intact by Pearce, unfolds as follows. "In 1890, as a largely meaningless

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(10) See Thompson, E.P. (1978) 'The Poverty of Theory' p. 230 - 232. London: Merlin, and Popper, K. (1968) 'The Logic of Scientific Discovery' 2nd ed. London.



and cynical gesture to appease public sentiment, an ultra-conservative Congress passed the Sherman Anti-trust Act".<sup>(11)</sup>

The gesture was so vague as to be almost unintelligible and neglected to such a degree that it became dormant, if not actually impotent. Far from controlling combinations in pursuance of monopoly power, the law was used to far greater effect in hounding labour unions; a reversal of 'intent' later consolidated during the 1920's when the Federal Trade Commission was 'turned', from an agency designed to control business, to an agency dominated by business interests. Whilst Hofstadter, refrains from suggesting that such a portrait is entirely false, he, nonetheless, concludes that it is substantially misleading, largely because it tends to discount the .. "honest if ineffectual concern with the problems of size and monopoly, and genuine doubts about the proper means of solving them".<sup>(12)</sup> The liberal view of anti-trust portrayed here stems, in part, from telescoping the undoubted 'failure' of anti-trust law to such an extent that it overlaps and, ultimately, discounts the validity of the anti-monopoly movement altogether. Accordingly, the anti-monopoly movement is considered only insofar as it presents the necessity of being assuaged, sold out to, or manipulated by, cynical plutocrats. It will be readily apparent that the logical result of this reduction is the anti-monopoly movement is denied any organisational integrity what so ever.

Over and against the liberal-historians view portrayed above, the thesis advanced here is really very simple. There are specific

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(11) Hofstadter, R. (1967) 'What Happened to the Anti-trust Movement'? in 'The Paranoid Style in American Politics and Other Essays', New York: Vintage, p. 190.

(12) *ibid*, pp. 191/2.



reasons which account for the failure of anti-monopoly law, reasons which belong to the structure of law and the manner in which law conventionally addresses the corporate form of enterprise. These reasons more than account for the 'failure' of anti-trust law without having recourse to a conspiracy view of history or to a conception of an omniscient plutocracy; the specific failings of each of these accounts have been recorded in Chapter one. Moreover, in the final analysis, a theory of plutocratic omniscience can only gain credence through a cynical disregard or distortion of the organisational basis of 'anti-monopolism'.

The present Chapter attempts to give expression to the organisational basis of anti-monopolism. The intention is not so much to gauge the extent of anti-monopoly feeling, nor the somewhat intangible relation between popular sentiment and legislative activity, but rather to record the rudimentary nexus which sustained anti-monopolism in the first place. The organisational nexus is important for the reason that political sentiment should not be viewed as an automatic reflex of productive status but instead, as something which requires specific means for its articulation. Therefore, it is quite insufficient to point to the relative disadvantage of certain economic groups in relation to, and largely as a result of, the growth of the corporate economy, and thence to infer the inevitable tide of anti-monopolism. On the contrary, sentiment of this character requires substantial organisation, since it doesn't simply issue forth from the underlying dislocation of economic forces. This much should not be taken as a denial of any link between 'economic' organisation and 'political' action, merely that the link, if link is an appropriate word, is forged in a very special manner. Thus, the heart of the matter is the organisation of 'so called' 'economic activity' and the

struggle to preserve one set of social arrangements over another. The form of organisation of ownership and the organisation of anti-monopolism are, in this sense, inseparable - since they each depend upon the other - with the result that the concept of 'representation' is hardly a relevant method with which to grasp the phenomenon of anti-monopolism. Accordingly, the organisation of ownership and the organisation of anti-monopolism are continuous, not in the sense that 'pressure groups' are held to be continuous with 'economic' groups and thus to represent their interests, but in the sense that the arrangements entailed under one form of ownership and the positions articulated or generated within a particular type of 'political' organisation are inseparable as types of social relations. In a word, the organised defence of 'entrepreneurial ownership' is a necessary part of the continued existence of that form of ownership, which is not to say that such a defence is secured automatically by the form of ownership merely that, for analytical purposes, the two cannot be separated out because they are 'continuous'.

What then is the organisational basis of anti-monopoly politics? The roots of organised anti-monopolism are to be found in the agrarian campaigns of the late nineteenth century and, in particular, those directed against the railroads. For example, the Granger movement of the 1870's resulted, albeit indirectly, in the Granger laws designed to regulate the railroads. The importance of agrarian discontent is usually registered in a curiously abstract way as a generalised discontent with the economic and political changes of the late nineteenth century. Thus, it is often argued that, whilst these campaigns focused upon the specific inadequacies of the rate rebate system or the currency issue, these deficiencies were less important than the basic

'immorality of the system as a whole'.<sup>(13)</sup> Without in any way wishing to deny the force of this disgruntled reaction it must be stressed, however, that anti-monopolism was not just a generalised response to a shift in the principles of democratic government or, to a perceived interruption of the American Dream, still less was it purely a spontaneous outburst of popular sentiment. On the contrary, anti-monopolism contained exceedingly specific points of reference and particular grievances and, moreover, a distinct organisational structure. As Thorelli indicates "Opposition to the malpractices of transportation agencies and other 'natural monopolies' was always a significant part of the anti-monopoly movement in post-bellum years; in fact, until at least 1880 the outcry against the railroads constituted the core of that movement. Short-term exorbitance and flagrant discriminations of many varieties formed the focus of opposition to the railroads. Only secondarily were the farmers of the West and South, the Grangers, the independent, Reform and Anti-monopoly parties antagonised by the forms of railroad organisation".<sup>(14)</sup> It is true to say, however, that these particular grievances did engage more fundamental issues, in the sense that the deficiencies of the rate rebate system, for example, were inseparable from the issue of monopoly per se and, therefore, the form of organisation involved in their perpetration. But it is not the case that these specific grievances were but manifestations of some more basic morality play or, that the form of organisation was simply a secondary consideration. The relationship between **actual** grievances and more abstract issues is **far more** profound than is

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(13) Miller, G.H. (1971) 'Railroads and the Granger Laws', London: University of Wisconsin Press, p. 162.

(14) Thorelli, H. (1954) op cit. pp. 568/9.



credited by either Miller or Thorelli involving, as it does, the implication of so called 'abstract' issues in the actual formulation and even identification of grievances.

The importance of organisation in this respect is vital but it is a consideration which is all too easily forgotten. For example, Hofstadter remarks that, "... it is too little realised that the farmers, who were quite impotent as a special interest when they were numerous, competing, and unorganised, grew stronger as they grew relatively fewer, became more concerted, more tenaciously organised and self centred".<sup>(15)</sup> This is indeed a compelling indication of the limitations involved in reducing political influence to numerical strength and, a persuasive indictment of the contraction of politics to the mere expression of economic position.

The organisation of anti-monopoly politics was by no means clear cut. Indeed the organisation of 'the anti-monopoly movement, in defence of what amounts to the right to remain unorganised, contains an apparent paradox. Whilst it is quite true that the process of organisation in defence of individual enterprise against the encroachment of opportunity by organised conglomerates of wealth engendered tensions within anti-monopolism this did not, however, detract from the importance of organisation to the anti-monopoly movement. What these tensions did affect is the particular organisational objectives and, more importantly, the choice of legalistic remedies designed more to enable competition than to interfere with free choice.

It is perhaps a commonplace to assert that the organisation of

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(15) Hofstadter, R. (1955) 'The Age of Reform', New York: Vintage, p. 7/8.



political movements can only take place according to a set of more or less explicit premises and on the basis of a series of ideological/cultural conditions. It is these conditions and premises which provide a clue as to the unique thread which joins entrepreneurial endeavour and political democracy in a seemingly unbreakable weave. The link, once forged, proves an exceedingly versatile and inclusive tool in the construction of anti-monopolism as an organised movement. What, then, are these premises and conditions? In terms of the agrarian movement, undoubtedly the most important premise concerns the physical possession and use of land as a necessary and sufficient condition of valid ownership, legal title and property right. This commonwealth of land owning producers can then be protected by a form of minimalist state given over to sanctifying and guaranteeing the rights of separate producers. These components go to make up what Hofstadter entitles the Agrarian Myth, according to which Americans pay homage to the 'fancied innocence of their origins'. Its importance for us stems from the common vocabulary which the myth spells out, enabling a variety of disparate groups to coalesce in organised anti-monopolism. Furthermore, the consensual quality of the vocabulary of the agrarian myth denotes an important convergence between the exigencies of organising anti-monopolism and the essential features of entrepreneurial ownership - since they both depend upon the same cultural artefacts. Therefore, it is this co-incidence of structural features which heralds the form of ownership as an organising principle of anti-monopolism, rather than any clear cut relationship based on the 'interests' of the victims of economic disruption.

It has been indicated already that anti-trust legislation presents a certain paradox with regard to the regulation of free enterprise.

Likewise, the central place accorded to the collective organisation of anti-monopolism would appear to be at variance with its avowed intention; the preservation of individual entrepreneurs.

It might be expected, also, that the position of the farmer, within the anti-monopoly movement, is not exactly unambiguous, poised as he is between the dignity of labour, on the one hand, and the claims of independent ownership, on the other. Indeed, Hofstadter goes as far as to argue that the character of the American farmer evinced a dual structure, espousing at one and the same time solid entrepreneurial values embracing opportunity, progress, profit and commercial values and a form of agrarian radicalism, which vented his yeoman inheritance, betokening a solidarity with labour rather than capital. Far from manifesting a fundamental contradiction, this dual aspect of agrarian 'character' demonstrates what Hofstadter, in another context, called the co-existence of reform and reaction in American politics; the fact that anti-monopolism was organised around entrepreneurial or conservative principles against the encroachment of opportunity by big business. It is deeply significant, therefore, that the opposition to big business was based upon the idea of a privileged relationship between entrepreneurial endeavour and political democracy. As a political faith this relationship was useful in combining diverse political organisations and, as an organisational principle, it demonstrated the cleavage between entrepreneurial and corporate forms of ownership. In addition, anti-monopolism demonstrated the profound co-incidence between political organisation and the form of ownership. Thus the growth of land speculation in the latter half of the nineteenth century, unrelieved by the Homestead Act and facilitated by unrestricted entry until 1888, indicated a fundamental change in the form of ownership.

The Absentee-owner of land displaced the yeoman farmer as the prototype of agrarian America and the pattern of tenancy, entailed in absentee ownership, was consolidated accordingly. The Farmers Alliance and, more especially, the Populist movement can, then, be seen as organised expressions of the principles of entrepreneurial ownership and, therefore, a direct defence of its actual structure. For Hofstadter at least, the Populist movement was but "... another episode in the well established tradition of American entrepreneurial radicalism", an expression which well sums up the organisational principles of anti-monopolism.<sup>(16)</sup>

The importance of Populism for the anti-monopoly movement lay principally in the way that Populism sustained the idea of a single all important struggle, between the allied hosts of monopolies, the money power, great trusts and railroad corporations, in one corner, and the farmers, labourers and merchants, who produced wealth and paid their taxes, in the other. The struggle was viewed as fierce, the stakes as high and, above all, the contest as one which admitted of no middle way. Thus anti-monopolism was clearly defined as the opposition in American society and the price of failure as absolute despotism and/or the end of civilisation. The link between routing the plutocrats and the preservation of democratic freedom could scarcely have been made any stronger; a factor which perhaps accounts for the inclusive character of Populism. As we have seen already, this particular link has always been regarded as an essential feature of anti-trust legislation. For example, the Attorney General's Committee stated that "Anti-trust is a distinctive American means for assuring the competitive economy on which our political and social

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(16) Hofstadter, R. (1955) op cit. p. 58.



freedom under representative government in part depend".<sup>(17)</sup> The inclusive appeal of this sentiment, for Populism, was further reinforced by the unique crystallising power of the merest suspicion of conspiracy. Whether the locus of the conspiracy is alcohol, Communism or big business, it has always received its fair share of heated invective. Indeed, the corporate conspiracy was deemed to be so omnipotent that the farmers alliances, initially distrustful of all forms of government regulation, eventually countenanced almost any federal measure that would shift the 'balance' away from the 'corporate' economy. Even where such measures appeared to contradict fundamental principles of laissez-faire society, they seemed admissible given the deep cleavage riven by the polarisation of corporate and anti-corporate organisation. Whereas the Granger movement or rather the Granger laws of the 1870's, limited intervention to state level, the Alliance movement of the 1880's effectively paved the way for federal regulation and control of the corporate economy. As a result, the mere fact of federal action against the trusts was by no means as contradictory as it may seem to some contemporary observers. Although it must be reiterated that in this respect the Granger movement vested little faith in the idea of regulation per se. As Miller makes clear the farmer, "... showed little confidence in legislative control and continued to look to competition from waterways and more railways for a solution to some of his problems. The state and law, the farmer believed, were too easily perverted into instruments of advantage for the commercial classes".<sup>(18)</sup> A disquiet which was echoed in the very failure of

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(17) AGNCAT op cit. p. 2.

(18) Miller, G. (1971) op cit. p. 162.



the Granger laws to achieve their, admittedly limited, objectives. What this line of thinking demonstrates very clearly is the need to account for the resort to the legal regulation of monopolies or railroads since the actuality of legal regulation cannot be induced from the prevalence of a public clamour for a distinctly legal form of regulation. If for no other reason than because the clamour was not so much for legal regulation as for political and social annihilation. At the same time though, Miller does argue that the railroads preferred to make their stand in the federal courts for a number of reasons. In the first place, the companies seriously doubted the impartiality of the state courts, and it is true that these courts were highly responsive to popular pressures".<sup>(19)</sup> An idea which has been recycled by Pearce in the sense that local political organisation threatened the railroads in a way in which federal regulation could not and which would appear to indicate preference for the least ineffectual of two equally ineffective remedies.

The various agrarian organisations were by no means the sole basis of the anti-monopoly movement. Indeed, it was characteristic of the Populist movement in general that an organisational nexus was formulated which embraced a diverse range of 'causes'. Not least important of these alliances was that between 'yeoman' and 'labourer', agrarian and proletarian organisation. Thus, 'rural' and 'civic' labour were equivalent forms for the Populist movement engaging, as it did, both the Knights of Labor and the Farmers alliance. That these groups later diverged, labour toward more collectivist programmes under the aegis of the American Federation of Labour from 1886 onwards, and the farmers to commercial and even corporate

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(19) Miller, G. (1971) op cit. p. 175.

forms of organisation, does not in any way belie the potency of the alliance at the time. In this respect Millis & Montgomery make it clear that the demands of organised labour before the first world war were .. "of an individualistic, anti-monopoly, personal rights, uplift character rather than protection of the job and security of tenure".<sup>(20)</sup> Again, Thorelli appears to suggest that this anti-monopolism was perhaps a result of the effective separation of labour from the possession and control of its conditions of production.<sup>(21)</sup> Notwithstanding the apparent ease with which anti-monopoly sentiment emerged, the task involved in uniting these various groups under one umbrella should not be underestimated. In this respect the professional experience of the Populist leadership, albeit much of it an experience of failure, is a significant example of the organised structure of 'Populism'.<sup>(22)</sup> Likewise, the pre-eminence of merchants and business men, rather than farmers per se, in the reform movement of the 1870's perhaps highlights the importance of the organisation of 'interests' rather than their simple transmission from economic position to legislative outcome.<sup>(23)</sup> The fact that the farmers were organised on a different and more self consciously commercial basis by 1919, when the Farm Bureau Federation was founded or, that the farmers themselves began to fall afoul of the anti-trust laws,

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(20) Quoted in Thorelli, H. (1954) op cit. p. 147.

(21) Thorelli, H. (1954) op cit. p. 150.

(22) Hofstadter, R. (1967) op cit. details the previous involvement of the Populist leadership in a succession of 'lost causes'.

(23) Miller, G.H. (1971) op cit.

that is until their partial exemption along with labour organisations under the Clayton Act in 1914, in no way detracts from their vital and radical role in the latter half of the nineteenth century. Furthermore, and this is possibly the basic point, welding together seemingly diverse causes into a coherent movement, characterised above all by a deeply held consensus against the trusts, could scarcely have been achieved spontaneously.

In addition to organised labour and agrarian groups, the place of small and medium sized business should not be ignored. After all, these firms expressed the prototype of *laissez-faire* enterprise and, as such, could be expected to be in the forefront of anti-monopolist organisation. Even an apparent reluctance on behalf of businessmen to engage in an organised defence of free market forces does not detract from the role of enterprise in anti-monopolism. Of course, this reluctance would be irrelevant in any case given the priority of organisation over sentiment. In this respect the role of the Sovereigns of Industry cannot be overestimated. This organisation "... during the 1870's successfully, if temporarily, brought such diverse elements as farmers, labourers and urban middle class together for purposes of political and economic reform".<sup>(24)</sup> This organisation was stridently anti-monopolist and provided an effective framework for the crystallisation of entrepreneurial values, together with a programme for their defence. Likewise, the anti-trust league provided an important forum for independent businessmen.

At various times, then, the Granger and Reform movements of the 1870's organised the campaign against the railroads and the

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(24) Thorelli, H. (1954), op cit. p. 149.



farmers alliance orchestrated anti-monopolism which, by 1890, and buttressed by various Labour and business groups, was at the forefront of a national campaign against the trusts. W.S. Morgan notes the organised opinion of the farmers as follows: "Monopolies exist by law are chartered by law, and should be controlled by law. A trust is a conspiracy against legitimate trade .... It is demoralising in its influence, inconsistent with free institutions and dangerous to our liberties. To participate in a trust should be a crime subject to severe punishment".<sup>(25)</sup> Likewise, a farmers congress of the United States in 1889 reiterated its opposition to all combinations of capital which control the market, whether those combinations were in the form of trusts or not. Whilst the form of agrarian organisation was at least maintained by the Greenback movement, that is until 1888, the organisation of local farm labour groups successfully articulated more explicit demands for state action on the trust question. Such action, on the issue of trusts in general, betokened a much wider alliance with, for example, the Knights of Labour; an organisation which, during the 1880's, addressed itself to, amongst other objectives, the problem of 'strangling' monopoly. The demands for constitutional action on the issue of the trusts, initiated rather falteringly and perhaps unwillingly within agrarian farmers at first, were later furthered under the auspices of the national Anti-monopoly party formed in 1884 out of an 'amalgamation' of various state equivalents or predecessors. Together with the Sovereigns of Industry, the Anti-trust League and the National Labour unions, these were the diverse components of anti-monopolism in its first, largely populist, phase.

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(25) Scott Morgan, W. (1889) Quoted in Thorelli, H. (1954)  
op cit. p. 144.



The campaigns instituted under the banner of anti-monopolism were not, in the final analysis, unconnected with the Interstate Commerce Act of 1887 and the Sherman Act of 1890. Although it must be said that the connection, between popular sentiment and legislative remedy, is by no means clear cut. Whilst reaching a crescendo in the 1880's Anti-monopolism did not recede after this apparent victory, indeed Hofstadter argues that it was at its most intense until 1914.<sup>(26)</sup> Nevertheless, anti-monopolism underwent a subtle change of form as a result perhaps of its articulation within the provisions of 'progressivism'.

Quite simply it is not feasible to examine Progressivism in any great detail, nor is it essential to chart the precise demise of Populism and the exact germination of the Progressive movement. Indeed, a precise distinction between Populism and Progressivism is difficult to achieve. Perhaps the most that can be said, at this juncture, is that whilst Populism was characterised by a marked consensus, Progressivism heralded ambivalence on many crucial issues. Thus, Hofstadter is able to remark that .."the Populists had tended to be of one mind on most broad social issues, and that mind was rather narrow and predictable".<sup>(27)</sup> Whereas the Progressive movement attempted to realign the benefits and limitations of corporate size, by means of a distinction between 'responsible' and 'irresponsible' wealth, the Populist movement was unremitting in its hostility to big business per se. To be sure, the Progressive movement attempted to draw the equation between private property and political freedom ever more tightly, as George Mowry observed,

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(26) Hofstadter, R. (1967) op cit. p. 193.

(27) Hofstadter, R. (1955) op cit. p. 134.

progressivism was opposed to .. "the impersonal, concentrated, and supposedly privileged property represented by the behemoth corporation. Looking backward to an older America (they) sought to recapture and reaffirm the older individualistic values in all the strata of political, economic and social life".<sup>(28)</sup> In this they were at one with the Populists and, as one observer put it, the Progressives succeeded in enacting one after another of the Populist demands or, rather less charitably, they stole much of the Populists underwear and clothed it in more respectable garments. Although founded on a clear commitment to *laissez-faire* philosophy, the Progressive movement underwent a substantial modification ultimately perhaps aspiring to a form of leadership which Appleman Williams would describe as 'class conscious'; a form of enlightened self interest or 'reformism' prepared to hold the ring between corporate excesses and Collective Trade unionism.<sup>(29)</sup> As has been seen already the Progressive movement was to have a very important effect upon the unfolding of anti-trust enterprise, with the most obvious connections being the distinction between good and bad trusts and, the introduction of the rule of reason and the concept of abuse. There is, after all, a clear distinction between Populism, which was vigorously anti-monopoly and of undoubted importance in generating the 'possibility' of the 1887 Interstate Commerce Act and the 1890 Sherman Act, and Progressivism, which sought an operating equation between *laissez-faire* and industrial

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(28) Mowry, G. (1951) 'The California Progressives', Berkeley, pp. 88/9.

(29) Appleman Williams, W. (1961) 'The Contours of American History', New York: World Publishing.

concentration and, needless to say, failed abysmally in terms of its anti-monopolism, (whatever its more limited successes as a harbinger of regulation).

We have, so far, seen the substantial organisational basis of anti-monopolism, but the force of anti-monopoly sentiment presents us with a perplexing paradox. If Populism was as fervently anti-monopolist as is claimed, and given the sincerity of congressional intent in passing the 1887 and 1890 anti-monopoly laws, how then can we account for the failure of so laudable an attempt? Some have attempted to explain the underachievement of anti-trust legislation. Thus, Thorelli observes that, "It has been held that business regarded the anti-trust bill as completely innocuous or even favoured it as a means of 'pacifying the general disquietude without doing any serious damage to business interests'".<sup>(30)</sup> An opinion which resonates at varying amplitudes within the work of revisionist historians, for example, Kolko, Weinstein and latterly Pearce. This position has been criticised in Chapter one and, at this juncture, it need only be argued, along with Thorelli, that 'business' was not as homogenous as it appeared and that small business and agrarian representatives were scarcely invisible in their opposition to monopoly and in their support of the bill. For example, "The records of legislative debates furnish abundant proof that the direct and specific aim of Congress was to eliminate and prevent restrictions on competition".<sup>(31)</sup> Likewise, it is quite clear that in passing the Sherman Act "Congress meant to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements".<sup>(32)</sup> Although it must

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(30) Thorelli, H. (1954) op cit. p. 215.

(31) ibid, p. 571.

(32) See U.S. v. South-Eastern Underwriters Assn. 322 U.S. 533, 558, (1944).



be conceded that the question of intent is not crucial to this sort of argument. For example, it is perfectly possible to argue the complete sincerity of congressional intent and to account for the failure of anti-trust legislation by reference to its subsequent manipulation by corporate interests. This has been argued by many commentators. For example, Neale argues a similar point to the effect that a tradition of dissolving monopolies during the 1911 period of structural remedy was abrogated in favour of the mere regulation of business conduct.<sup>(33)</sup> As some would put it 'disillusion instead of dissolution' summed up the change in direction. Again this sort of argument ignores the defects inherent in law, which were written, or incorporated, into the provisions of anti-trust legislation. But the question still remains, why did anti-monopolism adopt a regulatory form so ill suited to its task namely, that of the legal regulation of monopoly? This is indeed the crux of the issue, for if anti-monopolism had a strong organisational base, and if congress was at least not uninterested in passing a measure to control monopoly, then why was the Sherman Act so constrained in principle, let alone in practice?

The reasons for anti-monopolism using the law as a regulatory agency are exceedingly complex and could be accounted for by ascribing an attitude of legalism to the social structure of late nineteenth century America. Thus the 'law' is seen as an essentially bourgeois construction, the anti-trust movement is viewed as a bourgeois organisation and anti-trust legislation is seen as an eminently suitable remedy. This sort of account may have its attractions, perhaps chief among them being its apparently all inclusive

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(33) Neale, A. (1966) op cit.



character. There are, though, more direct components which can be assembled into a more persuasive explanation of the legalistic draft of anti-monopolism. It must be remembered that the opposition to the corporations was based upon a strongly individualist conception of ownership and democracy. Accordingly, whilst the corporations were seen as impersonal assaults on individual liberty and opportunity they were, nevertheless, reduced to individual terms, whether as corporate entities or as constellations of personal characteristics. For example, the so called muckraking magazines of the progressive era were able "... not merely to name the malpractices in American business and politics, but to name the malpractitioners and their specific misdeeds".<sup>(34)</sup> Thus, the individualistic conception of the corporation in terms of individual agencies of malpractice made a resort to law appear eminently practicable. As we have seen, the extension of personal responsibility to include corporate behaviour was afforded by the general conception of the corporation as a legal person. Furthermore, if it were possible for the muckraking magazines to name the actual perpetrators of particular misdeeds, it was perhaps not unreasonable to accept that the law would be capable of doing likewise. In this sense, then, it would seem that the legal conception of the corporation and the journalistic arsenal interlocked to provide typical explanations of the roots of the trust problem. It was individual agents or individual corporations which were responsible for steering these vast conglomerates of corporate wealth to the brink of total domination and control of American Society. Accordingly, not only was the law required to do something, it was seen as being capable

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(34) Hofstadter, R. (1955) op cit. p. 188.

of doing something.

An example of the individualistic thrust of much expose journalism can be seen in the history of Standard Oil written by Ida Tarbell.<sup>(35)</sup> This history was serialised by McClures magazine, between 1903 and 1904, and undoubtedly focussed upon the particular exploits of John D. Rockefeller and his associates, principally, Henry Flagler, Samuel Andrews, Stephen Harkness and William Rockefeller. Thus Rockefeller was singled out as the symbol of the trust problem. With such powerful individualistic imagery it is perhaps a small step from exposure to enforcement. Therefore, this sort of journalistic foray undoubtedly contributed, in some sense, to the belief in the efficacy of legal sanction. To the extent that the sort of muckraking characteristic of the progressive era marks the culmination of a long process of expose journalism dating back to the 1870's, it is perhaps not unreasonable to suppose that it shaped the way that corporations were viewed and, in turn, paved the way for the acceptance of a legal remedy. This much perhaps indicates the way in which the form of law accorded with the way in which the problem was popularly conceived, but it doesn't tell us why there was a resort to legal remedy.

The idea that the trust problem should be approached by way of a strict application of the doctrine of personal responsibility has recently been renovated. For example, it is possible to detect very similar currents at work in the vigorous campaigns of Ralph Nader which appear to centre upon the accountability of corporate personnel. <sup>(36)</sup> The idea depends upon the enforcement of law

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(35) Tarbell, I. (1904) 'The History of the Standard Oil Company', New York: Macmillan, 2 Vols.

(36) Nader, R. et al (eds.) (1976) op cit, See also Nader, R. (1973) ed. 'The Consumer & Corporate Accountability', New York: Harcourt Bruce Jovanovich Ltd.

relating to personal responsibility. Whether or not this would 'work' is open to grave doubts, especially in view of the criticisms detailed in Chapter five. But what is important is that it reveals the feasibility of such an approach and, therefore, the basic individualistic structure of anti-trust legislation. Accordingly, as long as the trust problem is viewed in terms of the perpetration of individual acts by specific authors, then, it carries the strong possibility that a legalistic remedy is seen as appropriate. Undoubtedly such an approach to the problem would have, and indeed has had, some effect, but whether it succeeds in restructuring corporate relationships, and thereby alleviating the problem of monopoly, would have to be examined in the light of the constraints on law recorded already. In that regard it is possible to state that any effect would be at best limited.

A similar conception of individual responsibility was broached by Ross at the turn of the century. In the context of an argument which suggested that sin had become corporate and impersonal with the onset of the 'corporate' economy, Ross put forward the idea that corporate directors should be held personally responsible for every preventable corporate abuse.<sup>(37)</sup> Thus, the solution to the problem of corporate malpractice was, yet again, viewed in terms of individual accountability.

A persistent fear within the anti-monopoly movement was that at some stage a combination of the combinations would emerge to dominate every facet of American society, including government. This fear clearly hinged upon corporations getting together in a conspiracy to defraud the American public of its birthright. The importance

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(37) Ross, E. (1907) 'Sin & Society', Boston: Houghton Mifflin.



of conspiracy for the anti-monopoly movement and anti-trust legislation has been recorded in some detail. There is, though, an important connection between the two. If the basic threat was seen to be conspiracy, then it is not unlikely that the law would be used as a means of dealing with the problem and, that the concept of conspiracy would be accorded a central place within any ensuing legislation. Therefore, there is a congruence between the conception of the trust problem and the basic structure of law. From there it is but a short step to arguing that this congruence may explain the use of law as a regulatory remedy and also the basis of its relative failure.

If law is seen in some sense or other as a guarantee or condition of private property then again it is not unreasonable to suppose that the law would be used to ensure the persistence of private centres of decision making, based on private property. To the extent that big business is regarded as eclipsing the freedoms associated with private property, then, the corollary would appear to be that the law should defend those freedoms. Hence it is possible to infer the genesis of anti-trust legislation from the concept of private ownership. Thus, the prevalence of, what Hofstadter refers to as, Anglo-Saxon or Yankee 'thinking' is often held to account for the resort to legislation and legal enforcement as the appropriate redress for corporate 'wrongs'. For example, in order for the concepts of personal freedom and guilt to have any meaning it is necessary to defend the context in which they operate from the incursion of corporate disregard. Accordingly, it is possible to argue, not only that law should control monopoly, but that it can control monopoly both in principle and, if given enough attention and men of good will, in practice as well.



These partial accounts of the resort to the law may have much to commend them. For example, they each demonstrate the clear co-incidence of legal and popular conceptions of the trust problem. But what they fail to do is to explain why the law was used. This is a particular problem given the initial lack of faith in legal remedies described above. There is, however, one overriding sense in which the resort to the law can be explained persuasively. That is to say, short of a radical restructuring of American society what other option was available but the use of anti-trust legislation?

We have seen already how the link between anti-trust legislation and democracy was seen to depend upon the preservation of private centres of decision making within American society. This 'constitutional' link, however, is important for another reason. For example, the separation of powers, the balancing act whereby relatively distinct bodies are charged with the responsibility for reviewing other organs of state, is quite basic to any account of anti-trust legislation. In this scheme the law is charged with the responsibility both for controlling and proscribing behaviour and for reviewing and regulating the conduct of other social orders. Thus, the law is regarded in terms of a separate agency of review and regulation. It has been argued that this conception affects the ability of anti-trust legislation to achieve any significant alteration of corporate relations. This very same portrait of law, as a separate agency of review, also explains why the anti-monopoly movement was faced with no other option than that of legal regulation. Within the constitutional separation of powers where else could the movement look for the regulation of monopoly but the law? Law was the body responsible for the review and regulation of other social orders. Moreover, given that the trust problem was popularly

conceived in terms of the need for greater personal accountability and predicated upon the dangers of conspiracy, then, the law was more than likely to be the prime candidate for the regulation of monopoly. This candidacy was further re-inforced by the anti-monopoly movements basically conservative commitment to private property.

### Conclusion.

It has been suggested that the anti-monopoly movement had a strong organisational basis which, for a time, provided a radical critique of the emerging corporate economy. That this radicalism was enveloped by an essentially conservative commitment to laissez-faire economics, entrepreneurial freedom and private property, in no way detracts from its critical vigour. This commitment did, however, severely limit the range of solutions which were adoptable and thence, in the long run, served to vitiate the radical potential of anti-monopolism. Nevertheless, the existence of a strong organisational basis for anti-monopolism does not necessarily imply that such strength was automatically reflected in legislative activity. In this sense the implied disagreement between those who insist upon discounting the strength and depth of anti-monopolism in the run up to the Sherman Act, for example, John Clark, and those who, like Oswald Knauth, detect a profound uproar and frenzy concerning the trust issue prior to the Sherman Act, is misplaced.<sup>(38)</sup> Both perspectives seem to assume that popular sentiment is important;

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(38) Clark, J. (1931) 'The Federal Trust Policy', Baltimore: John Hopkins Press, and Knauth, O. (1914), 'The Policy of the United States Towards Industrial Monopoly', New York: Columbia U.P.

for the former, by its apparent absence or neutralisation by cynical plutocrats and, for the latter, by an overriding presence which enables a more or less automatic translation of sentiment into legislative effect. They each appear to assume either, that legislative activity is insulated from popular sentiment, (sentiment which is in any case grossly exaggerated), through some form of cynical manipulation by 'conservative' or 'business' interests or else, that legislative activity reflects public opinion in a wholly representative fashion. It is argued here that anti-monopolism cannot be reduced to the status of pressure politics and, therefore, to an adjunct of legislative outcome, without in some way colouring anti-monopolism with the all too evident failure of anti-trust legislation; a failure which has precise rather than plutocratic determinants. Furthermore, preoccupation with the presence, absence or extent of popular sentiment inevitably discounts the organisational basis and principles of anti-monopolism, reducing them to the preamble of what amounts to the sale of the century. On the contrary, the anti-monopoly movement had an authentic organisational basis which, for specific reasons, adopted a legislative approach, which was genuinely designed to do something about the trusts but which failed for reasons of its very design namely, its use of law as a prospective remedy.

## CONCLUSION



In conclusion I can only re-iterate what has been said already. The relative failure of anti-trust legislation in the United States depends upon two major factors. First of all, in attributing the process of regulation to 'law', that is to say, by framing it as anti-trust legislation, referencing certain acts as criminal and, by attaching definite penalties to the violation of the relevant statutes, law is clearly seen as an independent agency of review and regulation. Whatever its more general merits, this sort of perspective contains two main weaknesses.<sup>(1)</sup> Not only is there very little justification for distributing particular sorts of social relations to distinct and separate orders, but, also, the very process of separation, which is supposed to guarantee 'independence', means that law is placed in a position which makes it very difficult to comprehend the complexity of that which it is supposed to regulate. Thus, the very existence of anti-trust legislation means that 'law' is separated out from other sorts of social processes and cast as an independent review body. This separation is seen as vital to its proper function. But there are immense problems involved in analysing 'society' in this way; problems which are insurmountable when law is then supposed to regulate the complex equation between free enterprise and monopoly. Secondly, irrespective of the fact that law is placed in the untenable position of having to regulate the 'corporate' form of ownership, the way in which 'law' conventionally portrays the corporation, together with the strategies designed to achieve its

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(1) For an interesting defence of the concept of review in post-revolutionary society see Hirst, P. (1980), 'Law, Socialism & Rights', in Carlen, P. & Collinson, M. (eds.) 'Radical Issues in Criminology', Oxford: Martin Robertson.

regulation, are further indices of the failure of anti-trust legislation to fulfill its avowed objective. The corporation cannot be viewed as an extended and distorted analogue of the concept of private property. Moreover, in treating the corporation as if it would respond, either collectively or in 'person', in the way in which individuals are supposed to behave is to court disaster.<sup>(2)</sup> Fines, imprisonment and decrees are, at best, in appropriate and, at worst, irrelevant mechanisms of regulation. Although even if the arsenal of available sanctions were improved, then the way in which the corporation is seen to operate would place severe constraints on the viability of law as an agency of regulation.

Of course this does not mean that law has no effects, nor even that it has unintended effects. Rather any effects which can be attributed to the existence of anti-trust legislation do not involve what must be its fundamental tenet namely, the form of ownership. Since the form of corporate ownership remains intact, albeit in ways which would be unrecognisable in the declining years of the last century, then this alone is a compelling indictment of the fate of anti-trust legislation. But is it fair to judge the record thus? After all is not anti-trust legislation at least a minor success? Does it not affect prices, corporate designs and overbearing conglomerates at least a little? Maybe, but the essence of anti-trust legislation concerned the way in which the corporate form of ownership threatened the very basis of American democracy and entrepreneurial endeavour. As Schwartz has made

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(2) As we have seen Stone (1975) op cit. makes this point quite convincingly.

clear, competition is "... desirable on principle .. like political liberty and because political liberty is jeopardised if economic power drifts into relatively few hands".<sup>(3)</sup> Similarly, the anti-monopoly movement depended upon a very clear, and quite general, indictment of the form of corporate ownership. Accordingly, to argue that anti-trust legislation is but another lever for the adjustment of prices or the optimisation of output, is to misrepresent the nature of anti-trust legislation and to diminish the extent of its 'failure'.

To be sure, it may be possible to construct a type of legal regulation which does not depend upon the logic of subjective rights and the concept of private property, but this sort of regulation would still be limited by its formal role as an independent agency of review. To the extent that the form of regulation is not separated out thus, it would be necessary to ask in what sense can we talk of a distinctly legal regulation. For example, the possibility of viable regulation would seem to depend upon the very dissolution of the idea of 'law' as an agency of review. Instead, it has been argued that the only way to alter the relations of ownership is through a process of re-defining the parameters of control, title and possession. Needless to say, this is more difficult than it sounds, but it is only by altering the strategies of decision making, the forms of calculus and the status of the relations of title, possession and control that the relations of ownership can be 'regulated' in any meaningful sense of the word. This is the painful lesson of nearly a century of anti-trust legislation.

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(3) Louis B. Schwartz in AGNCAT op cit. p. 2.

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## CRIMES OF THE POWERFUL AND BEYOND: AN ESSAY REVIEW

KELVIN JONES

In an attempt to widen the focus of criminology and to render its categories more inclusive, attention has increasingly centered on white collar crime, organized crime, crimes of the powerful and, more recently criminal organizations, institutions and fractions of capital. This particular strand of criminology which takes the powerful as its object, ie., the criminology of the powerful, has increasingly used and come to rely on political economy as a resource. It is necessary to ask whether the comparative structures of criminology and political economy are such that they can be combined; whether the concepts of each are compatible with the other; and whether the concept of combination is a valid one? These questions are fundamental to both the criminology of the powerful and to the political economy of crime and law.

The most recent, and arguably the most developed, exponent of the "criminology of the powerful" is Frank Pearce who, in *Crimes of the Powerful* and "Crime Corporations and the American Social Order" [1], presents a fully developed combination of criminology and political economy. For the most part Pearce is concerned with three major themes. Firstly, that the American economy has not been based on free enterprise since the late nineteenth century. As such he is presenting an internal critique of legitimization ideologies based on the persistence of free enterprise, ie. based on an "imaginary social order". Secondly he deals with the "criminality" of big business in the sense of its direct involvement in "criminal" acts, eg. Standard Oil in its formative years. Thirdly he examines the ability of big business to enact legislation in its favour; to skew enforcement procedures to its advantage; to refocus anti-trust law from monopoly practices onto unionization, and, finally to encourage the growth of racketeering within, or in opposition to, the labour unions. In this sense his work provides an opportunity to examine both the possibility and the consequences of the combination of criminology and political economy.

Two main questions must be borne in mind with regard to such an

enterprise. One, how must criminology be constituted in order that it can address the "powerful" and with what consequences for criminology in general and two, has *Crimes of the Powerful* reformulated criminology so that it can achieve its objective? These two general questions locate Pearce's work in relation to the "criminology of the powerful". More specifically Pearce's work will be situated in relation to two criteria:

1. Its internal consistency or accuracy both *theoretically* and *empirically*, *ie. historically*.
2. Its overarching theoretical adequacy or validity [2].

These twin criteria, it will be argued, provide the grounds for a continuous critique of the *Crimes of the Powerful* through an examination of its handling of the specific areas of capital, the state history and empirical evidence. They also serve to demonstrate the exact range of inconsistencies and problems generated by the conjunction of two areas – political economy and crime. The critique is extended by the attempt both to offer a concrete alternative account of anti-trust legislation together with a basis for the proper conceptualization of crime and law within political economy.

*Crimes of the Powerful* is committed to an instrumentalist conception of the state with all the consequences for theoretical and political practice entailed in that position. It will be argued that *Crimes of the Powerful* is internally inconsistent in its application of this problematic – both in the sense that it embraces an element of state autonomy and, in relation to the highly selected realm of empirical material. Moreover the two series of problems – internal inconsistency (both conceptual and empirical) and the theoretical failings of the instrumentalist/idealist couple itself – stem directly from the contradictory relationship established between political economy and criminology.

Throughout *Crimes of the Powerful* there exists the presence of "big business", a presence that somehow functions as the ultimate, if not the proximate, explanation of events. For instance, big business was in "control" of the major political parties, the federal legislature, the federal agencies, etc.. Implicit in this is the idea that the state apparatus was in some way controlled by big business. In this formulation, Pearce reifies the state as something to be captured, as a powerful instrument to be *used* by big business. It follows that the state is quite clearly established as "thing" rather than as "autonomous subject". This commitment to one side of the couple – state as thing/state as subject – is at the heart of the problem. Pearce's resolution of it in favour of an instrumentalist conception of the state cannot even do justice to the complexity of the "empirical" evidence that he uses, nor is it a consistent resolution. Further, as Poulantzas



demonstrates, it is the instrumentalist/idealist couple itself, ie. independent of any commitment to one side or the other, that entails a conception of the state as an entity possessing its own power. The hegemonic fraction of capital is then free to either absorb the state's power through fusion with it, or be resisted by the state's power involving the independence of, or arbitration by, the state [3]. That Pearce advocates the fusion thesis is only central to the question of consistency and application, it is not central to the question of adequacy. What is central to the determination of theoretical adequacy is the overall location of *Crimes of the Powerful* within the idealist/instrumentalist couple itself, a couple which generates the conception of the state as guardian of *its own power*. Instead, for Poulantzas, "The state does not have its own 'power', but it forms the contradictory locus of condensation for the balance of forces that divides even the dominant class itself, and particularly its hegemonic fraction – monopoly capital [4].

The thesis of state power is far from settled for political economy and the fact that Pearce treats it as if it were is of crucial importance to the conditions under which criminology and political economy can or cannot be conjoined. Moreover, *Crimes of the Powerful* is inconsistent in its formulation of a theoretical position, inconsistent in the application of that position to a series of data, and is unaware of the problems generated by the formulation of the position in that way. These systematic silences and anomalies, it is argued, betray the contradictory relationship between political economy and criminology.

Attendant on the failure to adequately derive a concept of the state is the lack of any explicit division within capital itself. Capital is simply left as an unfractured whole and its conditions of existence conceived as a unity. For, *Crimes of the Powerful* there is only big business; the rest is reduced to nothing. As will be seen there is, in *Crimes of the Powerful* an implicit demonstration of the empirical consequences of different fractions of capital, of a clash of political interests relating to diverse conditions of existence. Nevertheless, these remain outside the theoretical display since they are not part of Pearce's central concern namely – the demonstration of the total dominance of big business. There is a contradiction between the concept of capital used and the range of empirical evidence which implies a different concept of capital. The theoretical analysis is at variance with the empirical display, ie. two series of inconsistencies intersect.

Continuous with the problem of the state and the unitary concept of capital is the ahistorical approach of *Crimes of the Powerful*. There is little attempt made to confront the differential relationship between the conditions of existence of various capital fractions and the forms in which they are secured through time, ie., the differential "mobilization" of state and federal levels in relation to the historical displacement of the conditions of

existence of non-monopoly capital by those of monopoly capital. This particular silence leads Pearce to adopt an ahistorical subsumption of *all* interests to big business at *all* periods under consideration thereby ignoring the dynamic development of the monopoly capital form. Furthermore, as Pearce is committed to an instrumentalist view of the state and its relationship with big business this presupposes a prior separation of the two. This separation, whilst necessary for Pearce, is nowhere demonstrated in the analysis. The omission is two tiered for there is also no indication of any prior instrumental relationship between the state and, for example, entrepreneurial capital; big business is simply projected backwards in time as if it had always controlled the state. The analysis of the historical derivation of the state is inadequate and inconsistent in relation to the theoretical concept of state power.

The range and treatment of sources by *Crimes of the Powerful* suggests two things: One, the inadequacy of the concept of merger and two, that the empirical evidence is at variance with the argument. For instance, when he states that mergers were largely completed by the beginning of the twentieth century Pearce ignores two factors:

1. The "empirical" fact that there were three merger booms; 1898–1902; 1925–1929; 1955–1969, corresponding to three definite moments within the formation of monopoly capital. Namely: a) The phase of relative transition from relations of production characterized predominantly by non-monopoly capital to relations of production characterized by the pre-eminence of monopoly capital; b) The phase of consolidation; of the conditions of existence of monopoly capital; c) The phase representing the partial re-integration of economic ownership and possession signalling a new conjuncture of increased political conflict [5]. In short mergers were not "completed" by the beginning of the twentieth century and, more importantly, mergers occurred after they had supposedly finished. Mergers which had a very precise theoretical significance, ie. they were far from small scale and negligible as Pearce seems to suggest.
2. The crucial distinction between *economic* ownership – the ability to assign the means of production and to allocate resources and profits to this or that use – and economic possession – the direction and relative control of a certain Labour process – is lost to Pearce. In effect the distinction indicates that possession is not a necessary pre-condition for control, for example subcontracting, oligopoly, minority shareholder control and price leadership all represent effective forms of economic control of the market. So that to argue the completion of mergers is to say very little. Not only is this very dissociation of economic ownership from economic possession a consequence of the relative transition from

competitive to monopoly capitalism, ie. it denotes a particular phase of monopoly capitals formation, but it also means that the process of concentration and centralization of capital are effected under forms that are often hidden by legal ownership [6]. To place such store by the concept of merger in the light of the above considerations is to reveal a theoretical deficiency associated with a poorly specified empirical content – in that “mergers” were not completed anyway. Where he does raise the problem of other means of control he does so in terms of the subordination of all else to big business. The process fulfills a different function within Pearce’s theoretical framework since it serves to establish the absolute domination of big business rather than its conditions of existence and mode of operation in the market. Although monopoly capital did, in effect, “control” large sections of industrial production and distribution through merger *and* economic possession there were still significant sectors that were not “controlled” by monopoly capital.

### Anti-Trust Legislation

So far the problems which the state, capital, history and empirical material raise for a criminology of the powerful have been discussed separately. It is now necessary to consider to what extent they intersect in relation to anti-trust legislation. In the process one can trace the existence of continuities with other revisionists, continuities that are not accidental but rather reveal the same fundamental problem – namely the conflation of causes and effect.

In any analysis of anti-trust legislation it is necessary to draw a distinction between the anti-trust movement and the effectiveness of anti-trust enterprise. Pearce concentrates on the function and effect of anti-trust legislation and thereby ignores or reduces the anti-trust movement. Two statements serve as an occasion for analysis: 1) that “The attitude of the large corporations to the anti-trust laws developed from hostility in the late nineteenth century to an active involvement in their administration by 1914” [7] and 2) that “The corporations became aware of their precarious position in relation to the federal government and at the same time were recognizing their vulnerability to prosecution by socialist state legislatures” [8] and consequently they agitated for a “transfer of these powers to the federal level *where they would be able to effectively control the implementation of Federal regulation of their activity*” [9]. Several points of interest arise “internally” from these statements.

Firstly, the large corporations “hostility” to anti-trust legislation implies a certain degree of effectiveness in such legislation, an element of “threat” to the corporations. There existed, therefore, a period in time when anti-trust

legislation or enterprise was not enacted *by*, nor under the control of, big business and, as a result, was in a position to challenge its conditions of existence. Anti-trust legislation and, more especially the anti-trust movement cannot, therefore, be reduced to its control by big business since its prior independence is at least implied if not argued by Pearce. Yet Pearce explicitly argues the opposite namely, anti-trust *is* reducible to its functionality for big business.

Secondly, vulnerability to prosecution by *state* legislatures indicates the existence of significant interests opposed to the mergers and, in addition, suggests that since enforcement of anti-trust legislation could be controlled more effectively at federal than at state level, the federal/state split is *an* index of the division within the "power" bloc and an admission of the effectivity of political conflict.

Thirdly, the overall emphasis which Pearce places on the appropriation or control of anti-trust by big business explains away any possibility of anti-trust legislation being the product of political class struggle. The importance of class struggle is simply ignored in favour of the overwhelming, all pervasive, dominance of big business. Origins are collapsed into ends.

From these critical comments and elements of inconsistency alone it is possible to construct the existence, at the political level, of an "anti-monopoly alliance" comprising socialist, populist and entrepreneurial fractions that formed the anti-trust movement. As Hofstadter notes "often a common hostility to big business was the one link that bound together a variety of interest groups that diverged on other issues" [10]. This political alliance, once established, could be said to function, at least for a time, in opposition to the conditions of existence of monopoly capital, an opposition that was located in many significant respects in the federal/state split [11].

There are several points at which Pearce's formulation implies or allows alternative interpretations. Alternatives which derive as much from internal theoretical inconsistencies as from the particular choice of evidence. For example, in opposition to the earlier "fusion" thesis — regarding the relationship of the state to big business — Pearce erects the conception of the "states" short term autonomy vis-à-vis a section of the ruling class in the interests of the whole ruling class. As was demonstrated at the outset this is merely a change in terms since the couple which allows the state to be conceived in terms of having its own power is retained, ie. it is common to both the fusion and arbitration variants. "Big business" was, therefore, simply "restrained" in order that the system of hegemony vis-à-vis the dominated classes was not challenged. But by whom or by which class or combination of classes or fractions and indeed by what process? Pearce cannot answer this because his conception does not contain any extended analysis of the power bloc he has in mind.



There are, then five components to Pearce's analysis of anti-trust:

1. Mergers were effectively complete and, therefore, anti-trust was ineffective.
2. Mergers made a dramatic impact and there was a consequent need to assuage radical socialist and populist demands – demands that are not theorized at the political level but are merely referenced by Pearce.
3. The appropriation, co-optation or emasculation of anti-trust legislation by big business.
4. Mergers involved only one section, presumably big business, of the ruling class and the whole ruling class made its presence felt in opposition to big business in the general interest of long term survival.
5. The active involvement of big business in the advocacy of anti-trust legislation with the result that anti-trust becomes a front behind which the market is ordered and structured in the interests of big business.

These five components are positions made explicit at various points in *Crimes of the Powerful*. They represent the more or less ad hoc importation of an eclectic series of explanations or accounts borrowed in the main from revisionist history [12]. In themselves these accounts are not necessarily contradictory and thus Pearce is able to maintain their mutual articulation without too much trouble. What is important is that these various components, taken together with the positions which are either implicit or logically entailed in Pearce's work, reveal the fundamental absence of any critical comment on the concepts and theoretical systems introduced willy nilly into the area. The absence of a theoretical instance derived in the first place from political economy introduces the range of inconsistencies and contradictions that cloud a "criminology of the powerful". That such inconsistencies are registered at an overtly concrete level is evidenced by the apparent need to buttress *Crimes of the Powerful* with an eclectic reading of Revisionist history. The inadequacy of the concepts results in a retreat into history which, far from producing a solution, simply re-inforces the inconsistencies already there.

The historical sources for *Crimes of the Powerful* are supplied by revisionism in general and the work of Kolko in particular. Accordingly anti-trust legislation is seen as part of a conscious strategy advocated by big business and engineered by a powerful elite with a view to the rational stabilization of an increasingly competitive market. As a result big business controlled itself through the agency of a unified elite rather than being controlled by anti-trust enterprise. This formulation offers a voluntaristic, conspirational conception of big business in terms of a series of interlocking elites with the result that a reified political strategy on one side is arbitrarily

"coupled" with an abstract economic "need" or "necessity" on the other. Furthermore, the perception of an "increasingly competitive market", which supposedly contains within itself the "need" to be rationally organized, is based upon a series of misconceptions; of the conditions of existence of monopoly capital; of its "eventual" compatibility with "elements" of competition and; of the increasing "anarchy" of monopoly capital production (Lenin).

Thus we now arrive at the more general theoretical implication of *Crimes of the Powerful* in that anti-trust legislation is now seen as a product of the whole ruling class in the interest of the long term survival of the capitalist system as a whole. This position assumes an internal discipline within the power bloc itself together with the historical subservience of big business to the general capitalist interest. It is characteristic of this position that it can take one of two general forms involving either the relative autonomy of state power in relation to its function of organizing factor of, or for, the "ruling class" or, the pre-given internal consensus of the ruling class and its simple translation into state power through fusion with it. As a result anti-trust can be viewed as an anticipation of harsher measures, as a reaction to the reform movement or, finally, as the self-organizing principle of the capitalist system.

It is inherent in the method of *Crimes of the Powerful* that the inconsistencies generated within the concept of "state power"; ie. the failure to produce a consistent resolution of the concept in terms of either instrumentalism, idealism or even relative autonomy; leads Pearce to attempt to bury those inconsistencies in the apparent anarchy of empirical history. The decision to engage revisionist history in the form of Kolko leads inexorably to the demonstration of the relative autonomy of the capitalist class as a whole vis-à-vis big business in particular. This relative autonomy occurs within and on the basis of the more general fusion of the capitalist class and state power. This formulation is upheld notwithstanding the persistent reduction of state power to big business alone. Whilst being consistent in the adherence to "state power" as a concept the internal variations within that concept develop severe contradictions which are only compounded by the retreat into historical empiricism.

The preceding analysis has shown that *Crimes of the Powerful* is incapable of handling the concepts of big business, power and the state. That Pearce is aware of the problems is clear:

Thus the ultimate implication of this mode of analysis is the dissolution of criminology as a separate discipline [13].

Thus in analysing 'crimes of corporations' we are ultimately led to ask fundamental questions about the nature of America and the worlds 'free enterprise system' [14].

That neither the conditions nor the consequences of the dissolution of criminology are specified and that *Crimes of the Powerful* fails to ask fundamental questions of the "free enterprise system", let alone provide a framework for an answer, is a function of the incompatibility of criminology and political economy. Moreover, by implying the end of criminology the question of the proper formulation of the "powerful" is redundant, whilst the conditions under which crime and law can become central to Marxism are assumed to be covered by an eclectic combination of concepts. *Crimes of the Powerful* is, therefore, left in a theoretical vacuum since it belongs neither to criminology nor to political economy. If a "criminology of the powerful" were at all adequate to its object then quite simply it would cease to be "criminology".

The problems of *Crimes of the Powerful* are conceptual and logical. They can, in the end, be reduced to two, one the imperfect and ad hoc translation of political economy's concepts into criminology and two, the failure to address the fundamental debates within political economy concerning the nature of the state, capital and the interrelation, or even separate existence of the political and economic levels. This last carries the assumption that such debates either do not exist or, can effectively be ignored for the purposes of a "Marxist" position on criminology. The position argued here is that not only can those debates not be ignored but further such ignorance obscures the conditions under which crime and law can become central to political economy — namely by theorizing law and crime in terms of their centrality or otherwise to the reproduction of the conditions of existence of determinate relations of production.

### Towards a Political Economy of Crime and Law

It is now necessary to demonstrate the theoretical underpinning which makes the preceding critique possible. In short it is necessary to establish the theoretical position from which a critique can be mounted in the precise manner in which it has, together with the basis on which an analysis of corporate crime and law can be formulated within political economy rather than criminology.

The fundamental theoretical position taken here is that anti-trust legislation can be theorized on the basis of the historical dislocation between the conditions of existence of monopoly capital, on the one hand, and the conditions of existence of non-monopoly capital on the other. It follows that there is no *necessary* connection between the special "requirements" of monopoly capital and the form of their political securement. The two are conceptually distinct. It is thus not a question of reading off the interests of

monopoly capital at the political level, nor of seeing an automatic translation of economic interests into legislative enactments. Put simply on one side there are two definite sets of relations of production referring to the mode of appropriation and distribution of surplus labour involved in the monopoly and non-monopoly capital forms respectively and, on the other, there are the conditions of existence of the respective capital forms [15]. The securement of those conditions of existence is a matter of political and, more especially, class struggle and cannot be reduced to the automatic translation of the interests of big business into the existence of an anti-trust enterprise functioning as a rationalization program determined *by* and *for* big business — however that connection be mediated in Revisionist history. In concrete terms this results in the following analysis of anti-trust.

The inherent capacity of absolute free competition to generate monopoly through, in particular, the role of credit expansion and the joint stock enterprise leads to a number of consequences for the legal structure of property. They are: 1) the separation of beneficial ownership from control and 2) the separation of control from management. These separations are expressed through the double disjunction between, on the one hand, economic ownership and economic possession and, on the other, the capital function and the mere title to a portion of surplus value. Such changes have been theorized in a number of ways:

1. As the change in function of the legal form of property leaving that "form" intact and merely registering the separation of the capital function from the title to property as a change in the substratum — but still cast within the *same* legal form of property, eg. Karl Renner [16].
2. As the "... abolition of capital as private property within the framework of capitalist production itself..." [17] and the "... emergence as a *subject of the object* of property itself, ie., the complete emancipation of property from man himself..." [18]. In short the dissolution of private property within the capitalist mode of production itself with the result that the appropriation of surplus labour is part "social" or, at least *not* exclusively private.
3. "A juridically distinct form of private property no longer reflects the true state of things for the reason that — with the aid of methods of participation and control — the factual domination extends far beyond the purely juridic framework" [19]. In other words the dislocation between real economic domination and the juridic framework with the result that legal subjectivity becomes merely a "technical definition", a mere convenience, or a "speculative hypothesis" with no real basis.

What is of interest here is the real dissolution of private property as such — however that dissolution be registered in law. The consequences of



this dissolution for an adequate understanding of anti-trust legislation cannot be overstated since it is the dissolution of private appropriation within one capitalist centre – based on the co-incidence of the capital function and the title to surplus value – which directly undermines the conditions of existence of non-monopoly capital. This dissolution takes the form of the three fold division of property into:

*Title* – stockholders for example, simply receive a title to a certain proportion of non-labour income as compensation for their loss of effective control, for their loss of the capital function in production and for their loss of independent ownership. Owners of capital are transformed into mere owners, mere money – capitalists. The "... total profit is henceforth received only in the form of interest, ie., as mere compensation for owning capital that now is entirely divorced from the function in the actual process of reproduction" [20]. The "beneficial ownership" of assets and profits is consequently separated entirely from control. This does not represent a socialization of the capital function but merely a partial socialization of beneficial ownership through its wider distribution.

*Possession* – the direction and relative control of a certain labour process (Poulantzas) or the technical capital function, ie. economic possession. In other words the "Transformation of the actually functioning capitalist into a mere manager, administrator of other peoples capital"[21].

*Economic ownership or control* – the ability to assign the means of production and to allocate resources and profits to this or that use. This is the function of general economic direction [22].

Just as these developments relate to the ownership/possession of the means of production so too with the form in which direct producers are separated from the means of production, ie., their double separation from the "possession" of the means of production and their separation from the (economic) ownership of the means of production. In short this twin separation of producers from the means of production and of the various functions of property from each other indicates the emergence of social property and social capital – the capital of directly associated producers (Marx) – and the "... appropriation of social property by a few [23]. In other words the development, in a new form, of the antithesis between private and social wealth and the restriction of social capital within the monopoly capital form, ie. through its appropriation. It is "private production without the control of private property" [24].

Without this development of its conditions of existence, especially the role of credit, monopoly capital would not exist in the fact of its reproduction, it would not exist in the monopoly capital form. The dissolution of the property form and the development of social capital are essential conditions for the extended reproduction of monopoly capital.

There are, then, two questions that effectively locate anti-trust legislation in relation to the dissolution of private property within the capitalist mode of production they are:

1. What degree of compatibility, or difference, is there between the condi-

tions of existence of monopoly and non-monopoly capital respectively and what consequences do each entail for the other?

2. In what form are those conditions secured and with what result?

As for monopoly capital there is, at first, no restraint on its existence within a free enterprise economy since monopoly is inherent in any extended *free* competition. The problem, for the conditions of existence of monopoly capital, is precisely located in the relation between monopoly and non-monopoly capital. The conditions of existence of non-monopoly capital are threatened in two ways. One "physically" – in that small capitals are peacefully, or not so peacefully, expropriated by big capitals (Luxemburg) – and two, in that the dissolution of "private" property entails considerable threat to the extended reproduction of the non-monopoly capital form. It is almost as if the conditions of existence, in their traditional form, vanish. The way then becomes clear for a political analysis of anti-trust in terms of its role in the re-affirmation of the conditions of existence of non-monopoly capital. The anti-trust movement is, therefore, based on a political alliance founded on the centrality of private property for the preservation of the democratic forms associated with the hitherto free-enterprise economy. The process is genuinely political and cannot be reduced to the presence on the political stage of non-monopoly capital in person. The process is subject to the particular historical conjuncture in which those politics are played out and is in no way guaranteed but is instead subject to considerable contradictions, eg. the need to organize to remain unorganized, the need for federal regulation as against the traditional diffuse and ill-defined government; the split between the rule of reason and strict enforcement and the "real" object of anti-trust legislation – collusion or capital centralization.

To some extent anti-trust legislation was framed with the reality of monopoly capital's conditions of existence in mind. It was not *merely* a front or a cardboard gesture and, as such, affected the rhythm and profile of monopoly capital's extended reproduction but not its central dynamic. The final assessment of anti-trust effectiveness must rest with the conditions in which monopoly and non-monopoly capital's respective conditions of existence were rendered compatible, ie. by the preservation of non-monopoly capital in terms of its functionality for monopoly capital. Non-monopoly capital does not vanish but instead continually reproduces itself in relation to monopoly capital [25]. The form in which those conditions of existence are secured is then subject to further political process.

This conception avoids a whole series of problems bound up with economic determinism, relative autonomy and idealism. It does this by abolishing the notion of the necessary translation of economic or structural

requirements into their *self*-securement. It introduces the concept of class struggle, avoids the post-hoc reduction of causes to functions and refrains from writing history in the future anterior.

## Conclusion

I have argued that the problems with *Crimes of the Powerful* are instances of the inherent limitation of a "criminology of the powerful" and thus are not specific to a particular text, but refer centrally to a particular enterprise. These problems result from the contradictions entailed in the conjunction of criminology and political economy and the formal use of concepts derived from the latter as an explanation of, or gloss on, problems generated by the former. The formal introduction of the concepts of political economy does not, of itself, entail a break with the criminological agenda and, as a result, the analysis produced is inadequate to its object – the powerful. It is the position of this article that if one is to theorize upon either corporate crime or anti-trust law then political economy must assume priority – or else one simply establishes, as does Pearce, the "criminality" of big business. It is not the case that crime and law are irrelevant areas for political economy and, more especially Marxism, but rather that a proper understanding of the theoretical requirements necessary for an adequate analysis of corporate crime and anti-trust law must, of necessity, be founded in political economy, not criminology. Hitherto these requirements have not been met by criminology. This can be witnessed by the way in which criminology has addressed political economy, ie. in a purely arbitrary fashion in which concepts are simply adopted as if they were given – concepts which are effectively riddled with contradictions. Until these theoretical requirements are met, or built upon, then criminology is doomed to receive into itself a simple multiplication of texts like *Crimes of the Powerful* together with all the consequent inadequacies associated with such texts. In such a context the "powerful" remains an ever elusive object

## Notes

- 1 Pearce, F. (1976). *Crimes of the Powerful*, London: Pluto Press; Pearce, F. (1973). "Crime, Corporations and the American Social Order" in Taylor I., and Taylor, L. (eds), *Politics and Deviances*, Harmondsworth: Pelican.
- 2 It is one of the problems of the eclectic nature of *Crime of the Powerful* and indeed of the "criminology of the powerful" in general, that it admits of various levels of critique. That such a critique exists on several different levels means that it is caught between theoretical refutation; factual inaccuracy; and factual refutation in terms of different or opposed facts derived from a different theoretical approach or problematic. The fundamental question of the level of proof or

the degree of adequacy is ambiguously grounded in neither theory nor data. This is not to deny that the major critique of the "criminology of the powerful" is theoretical, nor to represent this critique as an arbitrary juxtaposition of levels, but to point to the existence of several layers and to the contradictions and inconsistencies between them. The task then becomes one of subjecting those various levels, and the inconsistencies between them, to a theoretical critique – namely on the basis of the possibility of "combining" disciplines or "borrowing" concepts as between criminology and political economy.

- 3 For Poulantzas it is the "complex contradictory unity in dominance" of the several dominant fractions that explains "... how the *concept of hegemony* can be applied to *one* class or fraction within the 'power' bloc. This hegemonic class or fraction is in fact the *dominant* element of the contradictory unity of politically 'dominant' classes or fractions, forming part of the 'power' bloc". (N. Poulantzas (1973). p. 237) Whilst having no explicit concept or theory of the "power bloc", and hence no conception of the hegemonic class or fraction, it is quite clear that the position occupied by the hegemonic class or fraction in relation to the state would, for Pearce, be occupied by "big business". See Poulantzas, N. (1973). *Political Power and Social Classes*, London: New Left Books.
- 4 Poulantzas, N. (1975). *Classes in Contemporary Capitalism*, London: N.L.B., p. 158–159.
- 5 Beman, L. (1973). "What We Learned from the Great Merger Frenzy"; April 1973 p 70–150.
  - (i) The first merger movement was, conventionally, caused by the business failures of the 1890s together with the proliferation of railways, telegraph and telephone leading to the establishment of the first truly national markets. The dominant types of monopoly organization were trusts, mergers and combinations which in many industries embraced all existing capacity, ie., more than 90%. Pearce is quite correct in stating that the basic corporations were established prior to merger mania.
  - (ii) The second movement was governed largely by the parallel responses of separate organizations. The 1929 peak extended the domain of big business to new industries and created numerous vertically integrated enterprises, ie. the consolidation of monopoly capital. The conventional cause was the shift to autos and trucks with the consequent enlargement of markets and the destruction of *local* monopolies.
  - (iii) The third movement was more of an extended trend starting in the 1950s and peaking in 1968. The process produced the giant conglomerate form signalling in *part* the re-integration of economic ownership and possession with the co-incident elevation of the problem of the multi-national companies to the political agenda. Of course effective control still extended beyond possession.
- 6 The *centralization* of capital is defined by growth through merger and combination whilst the *concentration* of capital is defined by the growth of separate companies.
- 7 Pearce, F. (1976), op. cit., p. 85.
- 8 Ibid., p. 88.
- 9 Ibid., p. 86.
- 10 Hofstadter, R. (1955). *The Age of Reform*, N.Y.: Random.
- 11 For instance, the laissez-faire policy of federal government, ie. its *non-intervention*, aided – or at least did not prove an obstacle to – monopoly capital, especially where interstate monopolies were concerned. This, coupled with the more interventionist stance of local state policy towards monopoly capital's conditions of existence – albeit an ineffective intervention since state boundaries did not constitute an obstacle to monopoly capital in its corporation form – firmly establishes the *basis* for a division along federal state lines. Although Pearce makes nothing of this, preferring instead to rely on the *domination* of the federal government by big business as the explanation of any division.
- 12 By "revisionist history" I refer, in the main to the work of: Kolko, G. (1967). *The Triumph of Conservatism*, Chicago: Quadrangle; Wiebe, R. (1967). *The Search for Order*, New York; Weinstein, J. (1968). *The Corporate Ideal in the Liberal State*, Boston: Beacon Press; Appleman Williams, W. (1961). *Contours of American History*, New York: World Publishing; Hofstadter, R.



(1955), op. cit.. There are, of course, significant differences between these various authors although these remain internal variations within what is here described as "revisionist history".

13 Pearce, F. (1976), op. cit., p. 80.

14 Ibid., p. 105.

15 This position is based on the work of Hindess and Hirst as expressed in, for example:

Hindess, B. and P. Q. Hirst (1975). *Pre-Capitalist Modes of Production*, London: Routledge & Kegan Paul; Hindess, B. and P. Q. Hirst (1977). *Mode of Production and Social Formation*, London: Macmillan; Cutler, A., B. Hinde, P. Q. Hirst and A. Hussain (1977). *Marx's Capital and Capitalism Today*, London: Routledge & Kegan Paul. It is based on their work but is in no way an expression of their position.

16 Renner, K. (1949). *The Institutions of Private Law and Their Social Function*. London: Routledge & Kegan Paul.

17 Marx, K. (1974). *Capital*, Vol III, London: Lawrence & Wishart., p. 436.

18 Colletti, L. (1976). *From Rousseau to Lenin*, London: New Left Books, p. 98.

19 Pashukanis, E. B. (1951). "General Theory of Law and Marxism" in Babb, H. W. and J. N. Hazard (ed.) (1968). *Soviet Legal Philosophy*, Harvard: Johnson Reprint Corporation.

20 Marx, K. (1974), op. cit., pp. 436-437.

21 Ibid., p. 436.

22 This threefold formulation of "property" is not to be confused with the thesis of "managerialism" as it is commonly understood by sociology. A close examination of the text will reveal that managerialism is not implied but rather that the existence of two series of separations and two relations between title and possession and between possession and control constitute the formulation in this way.

23 Marx, K. (1974) op. cit., p. 440.

24 Ibid., p. 438.

25 Non-monopoly capital is continuously reproduced and is in turn functional for monopoly capital in its consolidated form in the following ways: 1) it occupies sectors of limited profitability; 2) it occupies new sectors of production which are subject to unacceptably high risks; 3) it occupies certain sectors of production requiring technological innovation; 4) it is able to train relatively unskilled Labour power; 5) it occupies secondary lines of production eg, accessories; 6) the higher costs of non-monopoly capital enables monopoly capital to equalize its prices and thereby conceal its excess profits behind a facade of efficiency or competition. Poulantzas, N. (1975) op. cit., pp. 142-143. The conditions of existence of monopoly and non-monopoly capital are, therefore, compatible in terms of the *extended* reproduction of both.